IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 883.

WILLIAM W. BIERCE, LIMITED, PLAINTIFF IN ERROR,

vs.

WILLIAM WATERHOUSE AND ALBERT WATERHOUSE, EXECUTORS UNDER THE WILL AND OF THE ESTATE OF HENRY WATERHOUSE, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

MOTION TO ADVANCE.

Now come the defendants in error, by their counsel, and respectfully move this honorable court that the above-entitled cause be advanced, under clause 2 of rule 26, as one heretofore adjudicated by this court upon the merits.

Very respectfully,

D. L. WITHINGTON,
A. B. BROWNE,
ALEX. BRITTON,
EVANS BROWNE,
Counsel for Defendants in Error.

Statement.

In *William W. Bierce, Limited, vs. Hutchins* (205 U. S., 340), it was ruled that the action of replevin therein involved was properly brought by the appellant, and the decision of the Supreme Court below to the contrary accordingly reversed. Upon a second appeal the case, being entitled *Hutchins, Trustee, vs. William W. Bierce, Limited* (211 U. S., 429), was advanced and heard, but dismissed because the judgment of the Supreme Court of Hawaii, wherefrom the appeal was sought to be taken, was held not to be final.

During the progress of the replevin suit, and as a part of the same litigation, suit was brought to recover upon the forthcoming bond given by Hutchins at the time the action in replevin was brought. That is the present case now here on writ of error by William W. Bierce, Limited, from the judgment of the Supreme Court of Hawaii, holding the sureties relieved from the obligation of such bond. The present case is, therefore, a substantial part of the controversy and the litigation. The record therein, now docketed here, presents the record in the former cases, and which is, of course, relevant thereto. All parties are anxious to bring the litigation to a close, and we are authorized to say, on behalf of counsel for the plaintiff in error, that they concur in this application to advance the cause.

If the cause may be advanced for hearing at the coming term, we beg to suggest that the necessities of distant counsel prompt the request that same may be assigned for argument on the last Monday of November (November 28th), or as near thereto in December as the convenience of the court will permit.

D. L. WITHINGTON,
A. B. BROWNE,
ALEXANDER BRITTON,
EVANS BROWNE,
Attorneys for Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 508.

WILLIAM W. BIERCE, LIMITED, PLAINTIFF IN ERROR,

vs.

WILLIAM WATERHOUSE AND ALBERT WATERHOUSE, EXECUTORS UNDER THE WILL AND OF THE ESTATE OF HENRY WATERHOUSE, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR PLAINTIFF IN ERROR.

HENRY W. PROUTY,
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Attorneys for Plaintiff in Error.

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IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Case.

This case comes before the Court by writ of error addressed to the judges of the Supreme Court of the Territory of Hawaii, and allowed by the Chief Justice of that Court. (R., 781.) It is desired by means of such writ to review a final judgment of the Supreme Court of the Territory of Hawaii entered November 23, 1909, which "affirmed in all things and respects" (R. 767) a judgment of the Circuit

Court of the First Judicial Circuit of the Territory of Hawaii, entered May 29, 1909, pursuant to and in conformity with a prior mandate or remittitur and opinion of said Supreme Court duly filed in the cause by reason whereof a judgment of said Circuit Court entered on the verdict of a jury in favor of William W. Bierce, Limited, plaintiff in error here, for the sum of twenty-eight thousand one hundred and fifty-six 74/100 (28,156.74) dollars damages, seven hundred and eleven 43/100 (711.43) dollars attorney's fees or commissions, and eighty-one 45/100 (81.45) dollars taxed costs,—in all twenty-eight thousand, nine hundred and forty-nine 62/100 (28,949.62) dollars,—against William and Albert Waterhouse as Executors of the Estate of Henry Waterhouse, deceased (R., 113), was vacated and set aside, and a further judgment was given and entered for and in favor of said Executors of Waterhouse and against the plaintiff William W. Bierce, Limited, "notwithstanding the verdict found by the jury," for the sum of ten hundred and ninety-seven 22/100 (1097.22) dollars costs. (R., 126.)

The action or cause in which said judgments were entered was *indebitatus assumpsit* on a "redelivery" or "return" bond in the penal sum of thirty thousand (30,000) dollars, dated July 21, 1903, and executed in favor of William W. Bierce, Limited, a corporation, by Clinton J. Hutchins, Trustee, as principal, and Henry Waterhouse and Arthur B. Wood, as sureties. (R., 21.) The bond was delivered in a replevin suit instituted in the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, by William W. Bierce, Limited, to recover from Clinton J. Hutchins, Trustee, certain property consisting of steel rails, spikes, switch material, cars, locomotives and other railroad construction material claimed as the property of said William W. Bierce, Limited, and alleged to be wrongfully detained by said Hutchins, Trustee, and was conditioned for the delivery of "the said property and all thereof" to said Bierce, Limited, "if such delivery be ad-

judged, and payment to said plaintiff" (Bierce, Limited) "of such sum as may, for any cause be recovered against the defendant" (Hutchins). (R., 21.)

On March 19, 1904, judgment had been entered in the replevin suit by the trial court in favor of the plaintiff, Bierce, Limited, and against the defendant Hutchins, Trustee, for the return forthwith of the property sued for in said action together with $1,045.00 damages for its detention, and $50.50 costs, and further that in default of such return, said "plaintiff, William W. Bierce, Limited, have and recover from the said defendant, Clinton J. Hutchins, Trustee, the value of said property found and adjudged herewith to be the sum of $22,000.00, together with damages for its detention from the first day of June 1903, to the date hereof found and adjudged to be the sum of $1045.00, together with the costs of this action taxed at the sum of $50.50". (R., 35, 36).

This judgment, after various vicissitudes of fortune and only after two appeals had been taken to and disposed of by this Court,

> Bierce, Limited, *v.* Hutchins, 205 U. S., 340,
> Hutchins, Trustee, *v.* Bierce, Limited, 211 U. S., 429

became final and no longer assailable by appeal or writ of error.

In the course of the opinion of this Court disposing of the first of the above-mentioned appeals, Mr. Justice Holmes said:

> "The suit was replevin for certain rails, cars, engines and goods, delivered by the appellant (William W. Bierce, Limited,) to the Kona Sugar Company, Limited, and sold by a receiver of that company to the appellee (Clinton J. Hutchins, Trustee,) with full notice of the appellant's claim. Originally there was a contract for the sale of this property for cash, but the Kona Com-

pany having failed to pay, the appellant offered certain 'terms in settlement of the contract' previously made, as follows; 'We will take in settlement of this contract the sum of $10,000.00, U. S. Gold Coin, and the promissory note of the Kona Sugar Company, Limited, for the sum of $37,044.53 in favor of William W. Bierce, Limited, payable six months after date at the Whitney National Bank, in New Orleans, bearing interest at the rate of seven and one-half per cent (7½%) per annum, and secured by first mortgage bonds of the Kona Sugar Company, Limited, par value equal to the note, said bonds being a portion of a duly authorized issue not exceeding $200,000. This offer is conditioned upon its acceptance by you, the payment of the money and the delivery of the note, with collateral, before 4 P. M. on Thursday, March 14th A. D. 1901.—Upon such payment being made to us before the hour named, we will deliver to you the bills of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials now awaiting delivery, upon the express condition and understanding that said rails, locomotives, cars, scales and other materials are and shall remain the property of William W. Bierce, Limited, until the full payment of the note above described, according to its terms.' This offer was accepted, this contract took the place of that previously made, and the property was delivered."

Upon consideration of the questions of law involved in that appeal the judgment of the Supreme Court of Hawaii which purported to reverse the judgment of the Circuit Court of March 19, 1904, above referred to, was in turn reversed and the cause was remanded to the Territorial Supreme Court for further proceedings, in conformity with the opinion of this Court.

Such further proceedings were thereupon had in said Court (R., 759-761) that said judgment of March 19, 1904, as above stated, remained in all respects unmodified and final.

Meanwhile, Henry Waterhouse, one of the sureties on the "forthcoming" or "return" bond, had died at Honolulu on or about February 20, 1904 (R., 77), and Clinton J. Hutchins, Trustee, and Arthur B. Wood, the two surviving obligors on said bond, being deemed to be persons of small financial responsibility, and the said Wood having permanently removed himself from the Territory (R., 61, 62), upon motion of the attorneys for the plaintiff, Bierce, Limited, the trial court on the 28th day of March, A. D. 1904, ordered the defendant Hutchins, Trustee, to file in the cause "a new redelivery bond with two sufficient sureties on or before the 2d day of April A. D. 1904" (R., 38, 39). The time so limited for the filing of such new redelivery bond was subsequently enlarged by order of the court, and on April 8, 1904, the defendant, Hutchins, Trustee, having failed to comply with said order, the trial court, on motion of plaintiff's attorneys, entered a further order in the cause directing the issuance of execution on said judgment of March 19, 1904 according to the terms thereof, unless the defendant, Hutchins, Trustee, should file with the Clerk of the Court on or before the 15th day of April, 1904, the requisite new redelivery bond (R., 41, 42).

Said defendant, Hutchins, Trustee, having failed to comply with this last mentioned order, execution upon said judgment in replevin was duly issued, and on May 23, 1904, was duly returned "unsatisfied, being unable to levy upon the properties herein described" (R., 43-45).

The last will of Henry Waterhouse, deceased, having been duly offered for probate (R., 77) the same was in due course "admitted to probate as the last will and testament and codicil thereof of said Henry Waterhouse, deceased," and on the 5th day of April, 1904 letters testamentary were issued to William Waterhouse and Albert Waterhouse, named therein as executors (R., 82).

Said executors, pursuant to the laws of Hawaii, published

the customary notice to creditors of said Henry Waterhouse, deceased, and the plaintiff, William W. Bierce, Limited, within the time limited by law, presented to said executors its claim against the estate, based on said unsatisfied judgment of March 19, 1904, and the redelivery bond above specified, and said claim was rejected (R., 85-92).

Thereafter, said William W. Bierce, Limited, on or about the 11th day of October, A. D. 1904, instituted its action of *assumpsit* based on said "redelivery" or "return" bond to recover against said executors of Henry Waterhouse the sum of $22,000.00 with interest from the 19th day of March, 1904, and costs of suit (R., 131).

The pleadings will be found at printed pages 129 to 140, inclusive, of the transcript of Record

On the trial of this action, which was had on the 7th day of May, 1908, and subsequent days, the plaintiff Bierce, Limited, introduced in evidence the record in the replevin suit, including said judgment, and the sheriff's return of the execution "unsatisfied", together with the testimony of competent witnesses to the effect that the property in question had not been "returned" or redelivered to plaintiff, in whole or in part, nor had the value thereof, or of any part thereof, been paid to plaintiff, although the amount of the damages awarded by said judgment for the detention of said property, viz., $1045.00, with costs, $50.50, and certain interest, $102.75, had been paid (R., 92, 93, 522).

The defendant Hutchins, Trustee, on his part to maintain a supposed defense based on an alleged tender or offer to return the property in question, offered in evidence the testimony of numerous witnesses and both sides having rested, the trial court charged the jury in material part as follows, the charge of the court being here reproduced at length because of its clear, comprehensive and impartial statement

of undisputed facts, including the history of the main litigation as disclosed by the evidence in this case, and of the contentions of the respective parties concerning the issues joined herein:

"The COURT: Gentlemen of the jury: The court instructs you that the following facts are undisputed in the evidence on this trial, namely:

That Clinton J. Hutchins, trustee, as principal, and Henry Waterhouse and Arthur B. Wood, as sureties, executed to the plaintiff, William W. Bierce, Limited, on July 21st, 1903, the so-called return or redelivery bond mentioned in the evidence; that said bond was executed and delivered to the High Sheriff and filed by him in the action of replevin mentioned in the evidence in which it was entitled, and that the conditions thereof were that if the property in controversy in said replevin suit, and all thereof, should be well and truly delivered to the plaintiff therein, said William W. Bierce, Ltd., if such delivery should be adjudged, and payment to said plaintiff should be well and truly made of such sum as might for any cause be recovered against the defendant, Clinton J. Hutchins, Trustee, then said obligation should be null and void, otherwise to be and remain in full force and effect: Also, that thereafter, on the 19th day of March, 1904, William W. Bierce, Limited, the plaintiff in said action of replevin, recovered judgment therein in this court against the defendant therein, Clinton J. Hutchins, Trustee, adjudging that he forthwith return into the possession of the plaintiff the railroad rails, locomotives, cars, spikes, joints and other railway material constituting all of the property in controversy, and further adjudging that said William W. Bierce, Limited, have and recover from said Clinton J. Hutchins, Trustee, the sum of ten hundred and forty-five dollars as damages for the detention of said property from the 1st day of June, 1903, until the date of said judgment, together with the costs of said action taxed at the sum of fifty dollars and fifty cents; also adjudging that on failure of said Clinton J. Hutchins, Trustee, to forthwith make such return of said property into the possession of said plaintiff, that said plaintiff, William W. Bierce, Limited, have and re-

cover from said defendant, Clinton J. Hutchins, Trustee, the value of said property, found and adjudged to be twenty-two thousand dollars, together with the aforesaid sum of ten hundred and forty-five dollars, damages for detention, and costs taxed at fifty dollars and fifty cents; Also that thereafter, on April 15th, 1904, the special execution introduced in evidence was issued on said judgment, which was, thereafter, on the 23rd day of May, 1904, returned into the court by the sheriff, unsatisfied; Also that thereafter, on exceptions taken and prosecuted by said Clinton J. Hutchins, Trustee, the Supreme Court of the Territory of Hawaii entered judgment in said action of replevin, on the 6th day of May, 1905, reversing the said judgment in this court therein and sustaining the exceptions of the defendant, Clinton J. Hutchins, Trustee, in so far as they raised the question of election, and remanding said suit to this court with directions to enter judgment for the defendant therein, with costs. Also, that thereafter, on the 8th day of April, 1907, on an appeal prosecuted from said judgment of said Supreme Court by said William W. Bierce, Limited, to the Supreme Court of the United States, the latter court entered its judgment therein, reversing said judgment of the Supreme Court of this Territory and awarding to said William W. Bierce, Limited, its costs of said appeal, and remanding said cause to the Supreme Court of this Territory for further proceedings, in accordance with the mandate and opinion of the Supreme Court of the United States filed therein; Also, that thereafter, on the 27th day of September, 1907, the Supreme Court of the Territory of Hawaii, in accordance with said mandate and opinion, entered judgment in said action in favor of said William W. Bierce, Limited, and against said Clinton J. Hutchins, Trustee, for the sum of seven hundred and forty-eight dollars and fifty-seven cents costs, which judgment remains unpaid and unsatisfied; also, that thereafter, in accordance with said mandate and opinion of the Supreme Court of the United States, the Supreme Court of the Territory of Hawaii made and entered an order in said action of replevin overruling the exceptions of said defendant, Clinton J. Hutchins, Trustee, a notice and certified copy of which said order

constituting the mandate of said Supreme Court has been filed in this court in said action of replevin, the effect of which is to leave the said judgment of this court in full force and effect, the same as if no judgment of reversal thereof had ever been rendered by the Supreme Court of this Territory; Also, that on or about the 18th day of April 1904 the defendant, Clinton J. Hutchins, Trustee, paid to the plaintiff, William W. Bierce, Limited, the amount of the damages for detention, ten hundred and forty-five dollars and costs taxed at fifty dollars and fifty cents recovered by the said judgment of this court, together with interest on the value of the property in controversy therein, adjudged to be twenty-two thousand dollars from the date of said judgment, March 1904, until the date of the issuing of said execution, April 15th, 1904, the three items so paid amounting in all to the sum of eleven hundred and ninety-eight dollars and twenty-five cents; aside from which nothing has been paid on said judgment to the plaintiff, William W. Bierce, Limited, and the sum of twenty-two thousand dollars therein adjudged to be the value of the property in question, has not nor has any part thereof, nor interest on said sum since the 15th day of April, 1904, been paid to the plaintiff, William W. Bierce, Limited; Also, that on or about the 20th day of February, 1904, Henry Waterhouse, one of the sureties on said redelivery bond, died at Honolulu, leaving a will, in which he appointed the defendants, William Waterhouse and Albert Waterhouse as executors thereof, and that said will was admitted to probate and letters testamentary thereon were duly granted and issued to said executors by this court on or about the 4th day of April, 1904; Also that thereafter and before the beginning of this action the plaintiff presented to the said executors its claim against the estate of the said Henry Waterhouse, deceased, for the value of said property as so adjudged to be the sum of twenty-two thousand dollars, with interest thereon, which claim was rejected by said executors.

The principal questions which you will have to consider are, whether the property involved in the replevin case has been returned to the plaintiff; or, if not,

whether any actual and sufficient tender of the property was made to the plaintiff by Hutchins.

The court instructs the jury that the said Henry Waterhouse by executing the said redelivery bond, as one of the sureties thereon, in contemplation of law authorized said Clinton J. Hutchins, Trustee, to represent him in said action of replevin, and said Waterhouse thereby became identified with said Clinton J. Hutchins, Trustee, in interest and claimed in privity with him, so as to be concluded by the proceedings and judgment in said replevin suit, and that the record of the proceedings and judgment in said suit are also conclusive and binding upon the defendants in this suit, William Waterhouse and Albert Waterhouse, as executors under the will and of the estate of Henry Waterhouse, deceased.

The court instructs you, that by executing said redelivery bond the obligors therein, including said Henry Waterhouse, admitted that said Clinton J. Hutchins, Trustee, had possession of the property in controversy at the commencement of said replevin suit, and that said property was taken out of his possession when levied upon and seized by the sheriff in said suit, and was returned into his possession by the sheriff upon the execution and delivery of said bond; and that these admissions cannot be controverted on this trial but are binding and conclusive upon the defendants in this suit, who, in respect to any of the matters so admitted, are estopped from alleging that the contrary is true.

The court instructs the jury, with reference to the written offer to return the property in question, signed by Clinton J. Hutchins, Trustee, and delivered to the plaintiff's attorneys, bearing date the 18th day of April, 1904, which has been introduced in evidence by the defendants, that the delivery of this written offer did not alone and by itself constitute a return of the property in question such as to relieve the defendants from liability in this action; and that unless you believe from the evidence that the delivery of said written offer was accompanied by such action on the part of said Clinton J. Hutchins, Trustee, as would enable the plaintiff or its attorneys to obtain actual possession of the

property in question, your verdict should be for the plaintiff.

The court instructs the jury that it is a question of fact for the jury to determine from all the facts and circumstances proved on the trial whether or not said Clinton J. Hutchins, Trustee, made a bona fide tender of the property in question to the plaintiff's attorneys. That in order that an offer such as that introduced in evidence on this trial may constitute such a bona fide tender, it is the law that it must be made in good faith for the purpose and with the intention of putting the party to whom it is made in possession of the property, and that it be not made colorably or for the purpose of laying the foundation for future litigation or defenses, without any intention of actually surrendering the property; and if you believe from the evidence that the offer in question was not made by said Clinton J. Hutchins, Trustee, in good faith for the purpose and with the intention of putting William W. Bierce, Limited, in actual possession of the property in question, your verdict should be for the plaintiff.

In regard to the deed dated June 13, 1903, which is in evidence, by which Clinton J. Hutchins, Trustee, conveyed the property in question to the Henry Waterhouse Trust Company, I instruct you that the recording of that deed in the Registry Office gave notice to the plaintiff that the legal title to the property had been transferred by Hutchins to the Henry Waterhouse Trust Company; and if you find from the evidence that an actual tender was made of the property by Hutchins, and refused by the plaintiff, you may take into consideration the fact that said conveyance to the Waterhouse Trust Company was on record, in deciding whether plaintiff was justified in refusing the tender.

The court instructs the jury, with reference to the question whether or not Clinton J. Hutchins, Trustee, returned the property in question to plaintiff or made an actual tender of the property to the plaintiff in good faith, that the meaning of the conditions of the redelivery bond in evidence was not that said Clinton J. Hutchins, Trustee, would allow the plaintiff, William W. Bierce, Limited, to hunt up the property and get it if it could, but was that he would return it to the

plaintiff, if the plaintiff succeeded in the action of replevin, and, while it is true that the property in question was so heavy and bulky as to make it difficult of actual manual delivery, and that the rule as to delivery is less strict as to such property than as to smaller articles, still it was the duty of Clinton J. Hutchins, Trustee, to take such action as would enable the plaintiff to obtain actual possession of the property, and unless the jury believe from the evidence that he had done this then he had not returned the property to the plaintiff within the meaning of the statute and the conditions of the bond, and your verdict should be for the plaintiff.

The court instructs the jury that the judgment in the replevin suit imposed upon Clinton J. Hutchins, Trustee, the duty of taking active measures to surrender the property to William W. Bierce, Limited, and not merely the duty of passive submission to a forcible taking of the property by legal process. Under the law it was the duty of Clinton J. Hutchins, Trustee, to seek William W. Bierce, Limited, or its representatives, and deliver the property to them, if they would receive it; and if the jury believe from the evidence that he failed to do this such failure constituted a breach of the conditions of the bond, rendering him and his sureties liable.

The mere writing and sending of a letter to the plaintiff's attorneys that the property was offered and delivered to the plaintiff would not be sufficient. When the judgment was entered in the replevin action in favor of the plaintiff, it became the duty of the defendant Hutchins to redeliver the property to the plaintiff or pay its value. The writing of such a letter would not amount to a delivery unless Hutchins followed it up and supplemented it with active steps to secure to the plaintiff an actual delivery of the property. In this connection you are entitled to take into consideration any evidence which may tend to show whether at the time any such offer was made the property was on land belonging to Hutchins or on land belonging to other persons and over which he had no control. The plaintiff was not required to go upon the lands of third persons to locate the property and get it if it could.

An offer or tender to deliver property in order to be effectual must be made in good faith. Whether or not the offer claimed to have been made by Hutchins to return the property in question was made in good faith is for you to decide upon the evidence in this case. In this connection you should consider whether it has been shown that at the time the offer was made Hutchins had authority to return the property.

I instruct you that under the judgment which was rendered in the replevin case it became the duty of the defendant to return all of the property in question. The plaintiff was not required to accept a portion of it, nor was the sheriff authorized to accept any portion of it less than the whole. If, therefore, you believe from the evidence that a part only of the property was tendered, or that some of it was so situated that it could not for any reason be delivered by Hutchins to the plaintiff, your verdict must be for the plaintiff.

I charge you that the return of the deputy sheriff is indorsed on the execution, to the effect that he as unable to levy the writ on the property therein described and that he therefore returned the writ unsatisfied, is a part of the record of this court in the replevin case, and as such it imports absolute truth and is binding and conclusive on the defendants as to all acts done under and pursuant to the writ while it was in the hands of the deputy sheriff. You are therefore instructed, in considering your verdict, to disregard all testimony that you may find which tends to contradict the return of the deputy sheriff relating to the time the execution was in his hands.

The court instructs the jury that nothing short of an absolute or unconditional tender of the property in question to the plaintiff would relieve the obligors on the bond from liability to the plaintiff for the value of the property, and if you believe from the evidence that the offer of Hutchins to return the property in question to the plaintiff was made upon any conditions or condition, then it would not constitute a defense to this action.

I insruct you that upon the return of the execution in evidence in this case, the right at once accrued to the plaintiff to maintain its action against the principal

and sureties on the redelivery bond for the value of the property as fixed in the judgment in the replevin case, with legal interest thereon and such costs as may have been properly taxed against the defendants in that case, and nothing less than the payment of such value, interest and costs would constitute a defense to this action.

* * * * * * *

The court instructs the jury that the fact that the suit was discontinued during the trial as against the defendants Clinton J. Hutchins, Trustee, and Arthur B. Wood, the two surviving obligors on the redelivery bond mentioned in the evidence cannot properly be considered by the jury in reaching a verdict in this case; that the plaintiff could not properly have proceeded to trial against the present defendants without discontinuing its suit as against said survivors, and the jury will not consider such discontinuance as a circumstance unfavorable to the plaintiff's case or as any evidence of an intention on the part of the plaintiff to release said obligors from their liability on said bond, if the jury believe from the evidence that they are liable thereon; and the jury are instructed to disregard any and all remarks made by counsel in the presence or hearing of the jury to the effect that such discontinuance tends to prove an intention on the part of the plaintiffs to release said surviving obligors.

* * * * * * *

In regard to the document which has been received in evidence, dated April 14, 1904, being an option given to the Kapiolani Estate by the plaintiff for the sale of the property in question, I charge you that the court having decided in the replevin case that the property belonged to the plaintiff, the plaintiff had the right to sell it or give an option on it whether plaintiff had actual possession of it at the time or not, and the option in question or any similar option could therefore have been given without prejudicing in any way the plaintiff's claim that Hutchins had not made a redelivery of the property.

* * * * * * *

The court instructs the jury that in determining the weight to be given to the testimony of the several wit-

ness you should take into consideration their interest in the event of the suit, if any such is proved; their apparent candor or lack of candor, their apparent fairness or bias, if any such appears; their appearance and manner on the stand; the reasonableness or unreasonableness of the story told by them, and all the facts and circumstances tending to corroborate or contradict such witnesses, if any such are proved.

The court instructs you that in passing upon the testimony of the witnesses you have a right to take into consideration any interest which such witnesses may have in the result of this suit, if any is proved, and to give to the testimony of such witnesses only such weight as you think it entitled to under all the circumstances proved on the trial.

The court instructs the jury that while it is the duty of the jury to carefully scrutinize and dispassionately weigh the evidence of all the witnesses in the case, still it is your sworn duty to give proper credit to the evidence of each and all of the witnesses, and,if possible, to reconcile all of the evidence in the case with the presumption that each witness has intended to speak the truth, unless by their manner of testifying on the witness stand, or by inconsistent statements sworn to, or by testimony inconsistent with other credible evidence in the case, you are led to believe that the testimony of some one, or more, of the witnesses is untruthful or unreliable, or unless you are led to believe, from a manifestation of interest, bias or prejudice that such witness or witnesses have been inclined to exaggerate, color or suppress the truth, or unless they have been impeached in some of the modes known to the law.

The court instructs the jury with reference to all questions to which objections have been sustained by the court and all testimony of witnesses which has been striken out by the court, as well as with reference to all papers and documents which have been offered but not received in evidence, that the jury should disregard all such matters as well as all remarks of counsel in relation thereto, if any have been made, and should consider only the evidence actually introduced on the trial in arriving at their verdict.

* * * * * * *

If the jury find the issues for the plaintiff, by their verdict, they should assess the plaintiff's damages in their verdict at the sum of Twenty-two Thousand dollars, determined to be the value of the property in question by the judgment in replevin, with interest thereon at the rate of six per cent per annum from April 15th, 1904, to which should be added seven hundred and forty-eight dollars and fifty-seven cents, the amount of the judgment for costs rendered by the Supreme Court of the Territory on September 27th, 1907, in favor of William W. Bierce, Limited, and against Clinton J. Hutchins, Trustee, with interest thereon at the rate of eight per cent per annum from September 27th, 1907, aggregating the sum of $28,156.74.

I instruct you that the plaintiff must prove its case by a preponderance of evidence, and the burden of the proof is upon it. If it does not establish its case by such preponderance of evidence, then your verdict must be for the defendants.

I instruct you that it is not necessary, in order to discharge the sureties from liability in this case, that a redelivery of the goods should be made. The condition of the bond would be satisfied, so far as the sureties were concerned, by a valid tender made in good faith by the principal on the bond; and if you find that such valid tender was made your verdict must be for the defendants.

In making such tender, where the goods are of the character of these in suit, it is not necessary to make a manual delivery. It is enough that they be tendered to be delivered in the same condition and at the same place as they were at the time the re-delivery bond was given.

The plaintiff, the obligee of the bond, is bound to act in good faith and with reasonable promptness towards the defendants in this action, whose testator, Henry Waterhouse, was a surety; and in case you find that a valid tender was made, as I have already instructed you, the plaintiff was bound in good faith to such surety and his representatives to accept or reject it promptly.

I instruct you that in this action on the redelivery bond it is not necessary that a tender of property con-

cerning which the bond was given should be kept good, and therefore if you find from the evidence that a valid tender of the property was once made by the principal obligor of the bond, Clinton J. Hutchins, Trustee, or his agent, to William W. Bierce, Ltd., or its agent, then and thereafter there was no obligation or liability upon the part of Clinton J. Hutchins, Trustee, as far as the rights of his sureties are concerned to keep the property in a position to deliver it up to William W. Bierce, Ltd., for a valid tender once made which is refused by the creditor, William W. Bierce, Ltd., in this case, will discharge and release he surety, Estate of Henry Waterhouse in this case, at once from all liability on the redelivery bond, and your verdict should be for the defendants.

I instruct you that the plaintiff, William W. Bierce, Ltd., being a corporation and only able to act through its officers or attorneys or agents, that all evidence as to the acts of its officers, attorneys and agents are to be considered by you as the acts of the corporation itself on the question as to whether the corporation plaintiff acted in good faith toward the surety on the redelivery bond, Henry Waterhouse, deceased, in all matters connected with the replevin suit and the judgment obtained in such replevin suit.

Although, gentlemen of the jury, I have heretofore instructed you that certain facts are undisputed in the evidence on trial, there are however certain other facts which are also undisputed in the evidence, which are as follows:

That prior to and at the time of the execution of the redelivery bond, William W. Bierce, Ltd., had knowledge of the situation of the property in question in Kona, Hawaii, that said property was not piled up or stored, but was laid down and used as a plantation railway and equipment; and that at no time during the replevin action or the times referred to in the evidence in this action on the bond was any of said property removed away from the premises or so called Kona plantation; that at the time the special execution introduced in evidence was issued on said judgment on April 15th, 1904, the defendants had appealed to the

Supreme Court of Hawaii from the judgment of the Circuit Court which had issued such execution.

* * * * * * *

You may retire now, gentlemen." R., 521-530.

At the close of all the evidence, both parties having rested, and before the giving of the foregoing charge, the attorneys for defendants had moved the court to direct a verdict in their behalf, upon the following grounds, viz:

"First. The sureties, and particularly the sureties represented by William Waterhouse and Albert Waterhouse, executors under the will and of the estate of Henry Waterhouse, deceased, and Mr. Waterhouse, particularly applying to Mr. Henry Waterhouse in his lifetime, having executed a redelivery bond conditioned on the affidavit of plaintiff in the replevin action, and the complaint of plaintiff setting forth the actual value of the property sought to be replevined at $15,000, and the fact that the complaint in said replevin action was thereafter amended to show, first the actual value of $20,000, and, second, said complaint was thereafter again amended in said action to show a value for $22,000, and the judgment in said action thereafter rendered for $22,000, the surety was thereby released by said amendments under the circumstances.

"Second. The cause of action alleged in the complaint in the replevin action at the time of the execution and delivery of the redelivery bond was by subsequent events changed and judgment was rendered on the amended cause of action, the sureties thereby released.

"Third. The property sought to be replevined had not been seized by the sheriff according to the statute at the time of the delivery of the redelivery bond, and the sureties consequently not liable under the bond.

"Fourth. The judgment of May 6th, 1905, by the Supreme Court of the Territory of Hawaii in the replevin action of Bierce against C. J. Hutchins, trustee, released the defendant sureties in this action.

"Fifth. If such judgment did not release the sureties, then such judgment at least makes the commencement of this action on the bond premature.

"Sixth. Or at least shows that no proof has been introduced by plaintiff's testimony showing breach of conditions of bond by defendant Hutchins, trustee.

"Seventh. This action on the bond cannot be maintained as no claim has been presented to or suit brought against the executors under the will and of the estate of Henry Waterhouse, deceased, according to the statute relative to claims against the estates of decedents.

"Eighth. This action on the bond is prematurely brought against the executors under the will and of the estate of Henry Waterhouse, deceased.

"Ninth. This action was prematurely brought against all parties defendant.

"Tenth. The sureties are released by change of venue from the Third Circuit to the First Circuit Court of the Territory of Hawaii without the consent of the sureties in the replevin action of Bierce against Hutchins, trustee.

"Eleventh. The sureties are released by waiver of a jury trial by plaintiff in the replevin action of Bierce, Ltd., against Hutchins, trustee.

"Twelfth. The surety represented by the executors under the will and of the estate of Henry Waterhouse, deceased, is released by the discontinuance of this case as to C. J. Hutchins, trustee, and A. B. Wood.

"Thirteenth. That the evidence shows the sureties were released by the acts of C. J. Hutchins, trustee, and the plaintiff, its agents and attorneys in relation to the property for which the return or redelivery bond was given." R., 103, 104.

This motion was denied by the trial court and an exception to the ruling was duly noted. R., 103, 104.

The jury having retired, returned a verdict in favor of the plaintiff William W. Bierce, Limited, as follows, viz:

"We, the Jury in the above entitled cause find for the plaintiff and against the defendants Wm. Waterhouse and Albert Waterhouse as executors under the will and of the Estate of Henry Waterhouse deceased for the sum of $22,000.00 with interest thereon at the rate of 6% per annum from April 15th, 1904, also for

the sum of $748.57 with interest thereon at the rate of 8% per annum from September 27th, 1907, the aggregate sum of the principal and interest being $28,156.74.
Honolulu, T. H., May 22nd, 1908." R. 105.

Defendants' attorneys thereupon moved the court for judgment *non obstante veredicto* upon the following, among other grounds, viz:

"7. Because the affidavit in replevin and the complaint based on the affidavits setting out the sworn value of the property in suit, upon which affidavit and complaint by law the re-delivery bond is based, which bond recites that the property is 'of the value of $15,000, as stated in the affidavit filed herein,' is and are judicial admissions made by the plaintiff in this action upon which the sureties in signing said re-delivery bond had a right to rely, and as to the sureties, the defendants in this action the plaintiff is estopped to claim that the value of said property is more than $15,000; and the subsequent proceedings by which the allegations of said complaint were amended to increase the alleged value first to $20,000 and then to $22,000, and the recovery of judgment for $22,000 as to the value of said property, operated to release the sureties from the obligation of said re-delivery bond and are not binding against said sureties, the defendants in this action." R. 105, 107.

This motion having been overruled (R., 108) and a moton for a new trial having been adversely disposed of, (R., 112) judgment was entered on the verdict May 29, 1908, in the following form:

"This action by complaint- as amended, claiming Twenty-eight Thousand One Hundred Fifty-six and 74/100 D[illegible]rs ($28,156.74) damages, came to the September [illegible]m A. D. 1904, and thence by continuance to the present Term, when the parties appeared, and were at issue to the jury.

Said cause having been heard and committed to the jury, they find for the plaintiff to recover Twenty-eight Thousand One Hundred Fifty-six and 74/100 Dollars ($28,156.74) damages.

Therefore it is ordered and adjudged by the court that the plaintiff, William W. Bierce, Limited, do have and recover from the defendants, William Waterhouse and Albert Waterhouse as Executors under the Will and of the Estate of Henry Waterhouse, deceased, Twenty-eight Thousand One Hundred Fifty-six and 74/100 Dollars ($28,156.74) damages, together with its attorneys' fees or commissions taxed at Seven Hundred Eleven and 43/100 Dollars ($711.42) and its costs taxed at $81.45 to be paid in due course of administration." R. 113.

To test the validity of this judgment the defendant, Hutchins, trustee, filed and perfected a bill of exceptions to the Supreme Court of the Territory of Hawaii. That document contained upward of one hundred and thirty (130) exceptions to the rulings of the trial judge in the course of the trial and to the action of the trial judge in overruling the plea in abatement, and on defendants' motion for judgment *non obstante veredicto*. This bill of exceptions in its entirety appears in the printed transcript of record before this court at pages 533 to 685, inclusive. Upon hearing this bill of exceptions in the Supreme Court of the Territory of Hawaii, that court, by a majority judgment, sustained "the exception to the overruling of defendants' motion for judgment *non obstante veredicto* in so far as it is based upon the discharge from liability by the plaintiffs' amendments of value" (R., 121, 125) made in the complaint in the replevin action:—"the remaining grounds of the motion and the remaining exceptions not necessarily involved" were "not passed upon" (R., 121).

Upon remittitur to the trial court that court, in obedience to the mandate, and in conformity with the opinion of the Territorial Supreme Court filed April 12, 1909, vacated and set aside the judgment entered May 29, 1908, on the verdict of the jury and further "ordered and adjudged that the plaintiff (William W. Bierce, Limited) take nothing by its writ, and that the defendants (William and Albert Waterhouse,

executors, etc.) recover of and from the plaintiff their costs, taxed at the sum of $1,097.22."

The opinion of the Supreme Court (Ballou, J., with whom concurred Hartwell, C. J.), together with the dissenting opinion of Wilder, J., are as follows (R., 114, 121).

Opinion of the Court by Ballou, J.

This is a bill of exceptions to review a judgment against the defendants, as executors of the will of Henry Waterhouse, upon a return bond in a replevin action executed by Henry Waterhouse as surety.

The replevin action was brought by the plaintiff against Clinton J. Hutchins, trustee, on July 20, 1903, and was for the recovery of certain railway material which had been used by the Kona Sugar Co., Ltd., the property of which corporation had been bought by Hutchins at a receiver's sale. Plaintiff alleged in its declaration that the actual value of the property was $15,000, and filed its affidavit in conformity with R. L. Sec. 2102, then Civil Laws, Sec. 1695, alleging, in conformity with the statutory requirement of "the actual value of the property" that the actual value of the property was $15,000 and tendered its bond in double that amount. Hutchins thereupon elected to retain possession of the property under R. L. Sec. 2112 by giving the return bond upon which the present action is founded, which reads as follows:

Circuit Court, Third Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee.

($1.00 stamp.)

Replevin.

Return Bond.

Know all men by these presents:

That we, Clinton J. Hutchins, Trustee, as principal, and Henry Waterhouse and Arthur B. Wood as sureties,

are held and firmly bound unto William Bierce Company, Limited, its successor or successors and assigns, in the sum of Thirty thousand (30,000) Dollars for the payment of which well and truly to be made, we bind ourselves, our successors herein and administrators jointly and severally firmly by these presents.

The condition of the foregoing obligation is as follows:

That whereas the said William W. Bierce, Limited, has begun in the Circuit Court of the Third Circuit of the Territory of Hawaii, a replevin suit against Clinton J. Hutchins, Trustee, to recover, from him certain property specifically set forth in the bill of complaint filed in said suit, and of the value of $15,000 as stated in the affidavit filed therein, and has requested that the said property be taken possession of by the High Sheriff of the Territory of Hawaii, or his deputies, and turned over to said plaintiff; and whereas said defendant is desirous of having said property returned and has required the return therof from said High Sheriff and his deputies;

Now, therefore, if the said property and all thereof shall be well and truly delivered to said plaintiff, if such delivery be adjudged, and payment to said plaintiff be well and truly made of such sum as may, for any cause be recovered against the defendant, then this obligation to be null and void, otherwise to be and remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this 21st day of July, A. D. 1903.

CLINTON J. HUTCHINS, *Trustee.*
HENRY WATERHOUSE, *Surety.*
ARTHUR B. WOOD, *Surety*

The foregoing bond is approved as to its sufficiency of sureties.

Dated July 21, 1903.

A. M. BROWN,
High Sheriff.

(Endorsed:) Filed, August 1st, 1903, 7 o'clock A. M. J. P. Curts, Clerk.

Before going to trial plaintiff amended his declaration by increasing the allegation of the actual value of the property from $15,000 to $20,000, which amendment was allowed by the court March 7, 1904, and at the close of his case by again increasing the value to $22,000, which amendment was allowed March 19, 1904. The case was tried, jury waived, and plaintiff recovered judgment for the return of the property with $1045 damages and $50.50 costs, with an alternative judgment in case of failure to return for $22,000, the adjudged value of the property, with the same damages and costs. Certain exceptions brought by the defendant Hutchins were sustained by this court, the decision being rendered January 28, 1905. *Bierce* v. *Hutchins*, 16 Haw. 418. At that time this was the court of final appeal in the case, no federal question being involved. On March 3, 1905, an act of congress was passed allowing appeals from this court in cases involving over $500. (33 Stat. 1035, c. 1465, sec. 3.) After a petition for rehearing decided April 29, 1905, (*Bierce* v. *Hutchins*, 16 Haw. 717), the plaintiff stated that it would have no further evidence to present if the case were remanded and asked that a judgment remanding with direction to enter judgment for the defendants, be entered in this court which, in the absence of objection from the defendant in the action, was done. An appeal from this judgment was allowed by the Supreme Court of the United States and the judgment reversed. *Bierce* v. *Hutchins*, 205 U. S. 340. This court then held that the defendant in that action was entitled to a hearing upon exceptions not passed upon at the first hearing (*Bierce* v. *Hutchins*, 18 Haw. 374), but after hearing overruled the exceptions. (*Bierce* v. *Hutchins*, 18 Haw. 511.) An appeal from this decision was dismissed (*Hutchins* v. *Bierce*, 211 U. S. —, December 14, 1908.)

Meanwhile Henry Waterhouse had died February 20, 1904, and the present defendants qualified as his executors. After the trial of the replevin action the plaintiff caused execution to be issued April 15, 1904, notwithstanding the pendency of the defendant's exceptions. The statute allowing this procedure upon good cause shown (R. L. Sec. 1861) had been passed April 22, 1903, before the execution of the bond now sued upon,

but went into effect August 1, 1903, the day the bond was filed and a few days after its execution. The execution having been returned unsatisfied, the present action, joining Hutchins, Wood and the executors of Henry Waterhouse as defendants, was filed on October 11, 1904, at which time the exceptions in the replevin action were pending in the Supreme Court of the Territory. A demurrer was overruled and the defendants answered. Before the case was brought to trial the Supreme Court of the Territory sustained the exceptions in the replevin action whereupon the defendants in the action on the bond pressed for trial, but continuances were granted by the court until after the first decision of the Supreme Court of the United States and the subsequent overruling of the remaining exceptions by this court. Upon a suggestion of misjoinder plaintiff discontinued as to Hutchins and Wood and proceeded solely against the Waterhouse executors. The case was tried before a Jury in May, 1908, the principal issue of fact being whether or not there had been an actual redelivery of the property in April or May, 1904, after the judgment of the circuit court. The jury found for the plaintiff for the sum of $22,000 with interest at six per cent. from April 15, 1904, also for the sum of $748.57 with interest at eight per cent. from September 27, 1907, the aggregate of principal and interest being $28,156.74. The smaller item was composed of costs in the United States Supreme Court and of costs in the Supreme Court of the Territory, the damages in the replevin action having been paid.

The bill of exceptions brings up 127 exceptions, most of which were argued and relied upon. Many of these, however, relate to the same points, the principal defenses of the sureties being that they were discharged by the amendment to the local statute allowing execution to issue in certain cases pending exceptions; that they were discharged by the amendment to the Organic Act allowing an appeal to the Supreme Court of the United States in cases involving over $5000; that they were discharged by plaintiff's successive amendments to its declaration whereby the alleged value of the property was increased from $15,000 to $22,000; that the suit was prematurely brought against these executors; and that

the law laid down by the trial court as the obligor's duty to return the property after judgment was inapplicable and misleading in view of certain correspondence in which Hutchins purported to deliver the property with certain conditions, which delivery was accepted by the plaintiff upon other conditions.

We find it necessary to consider only those exceptions which go to the amendments of value made by the plaintiff. This defense of the sureties is based upon the fact that the plaintiff in its replevin affidavit swore that the actual value of the property was $15,000, which fact is recited in the condition of the redelivery bond, the plaintiff's declaration containing the same allegation. After the execution of the bond the plaintiff amended the allegation in his declaration first to $20,000 and afterwards to $22,000. The prayer of the declaration was for judgment for the return of the property, with damages for detention and costs, but according to the practice in replevin, by which an alterantive cash judgment for the value of the property was rendered in default of the return of the property, the amendments amounted to an increase of the ad damnum, and the sureties claim that this is an alteration of their contract, and an increase in the risk assumed by which they are discharged from liability.

The question thus raised is one of considerable difficulty, and one on which the decisions are conflicting. The contract of the surety may be with reference to another contract, usually called the principal contract, between the principal and a third party, as a bond to secure the performance of a building contract; or on the other hand it may be with reference merely to an undertaking of the principal, as a bond that he will appear in court or that he will pay a judgment which may be rendered against him. The rule that any "alteration in the contract" releases the surety is frequently stated, but it is not always clear whether the contract referred to is the principal contract or the bond of the surety, or whether in the case of a surety for an undertaking the word contract is not used to mean either existing circumstances or the terms upon which performance may be demanded. In the case of a surety upon a contract any alteration in the principal contract releases the surety,

the commonest case being an agreement between the principal and the third party modifying the terms of the principal contract. *United States* v. *Freel*, 186 U. S. 309. Another kind of "alteration of contract" is an alteration made on the face of the bond itself (*Mortin* v. *Thomas*, 24 How. 315; *Smith* v. *United States*, 2 Wall. 219) or upon the face of an instrument referred to in the bond. *Miller* v. *Stewart*, 9 Wheat. 680. In the latter case, the instrument appointing a deputy collector was altered by the addition of a ninth township to the eight specified. The court lays some stress upon the alteration being on the face of the instrument, but the case has been widely cited and applied where there was no such technical alteration, but where a modification of the duties of the principal or of the terms of the undertaking guaranteed by the sureties has been held to be an alteration of the contract. Thus in *Reese* v. *United States*, 9 Wall. 13, the bond was for the appearance of a defendant at designated term of court in San Francisco 'and at any subsequent term to be thereafter held in that city.' A stipulation between the district attorney and defendant's counsel, approved by the court, that the case should be brought to trial only after final decree in certain civil actions and provided they were against defendant was held to discharge the sureties, the court saying:

"It is true, the rights and liabilities of sureties on a recognizance are in many respects different from those of sureties on ordinary bonds or commercial contracts. The former can at any time discharge themselves from liability by surrendering their principal, and they are discharged by his death. The latter can only be released by payment of the debt or performance of the act stipulated. But in respect to the limitations of their liability to the precise terms of their contract, and the effect upon such liability of any change in those terms without their consent, their positions are similar. And the law upon these matters is perfectly well settled. Any change in the contract, on which they are sureties, made by the principal parties to it without their assent, discharged them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound

by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking."

Here there was no alteration in the sureties' contract, and there was no contract, in the ordinary sense of that word, between the defendant and the district attorney which was subsequently altered. There was a modification, by proper authority, of the terms of the principal's undertaking to appear, which was held to be an entire discharge of the contract of the sureties. We dwell on this distinction because the use of the word contract in this connection appears to be the source of some confusion. In *United States* v. *Backland,* 33 Fed. 156, for example, the "contract" held to be changed had been fulfilled. A more accurate statement of the effect of the decisions of the Supreme Court is as follows:

"They have decided that the surety is discharged not merely by payment of the debt or a release of the principal, but by any material change in the relations between the principal and the party to whom he owes a debt or duty; and that the surety cannot be held in such case by showing that the change was not injurious to him. For he had a right to judge for himself of the circumstances under which he was willing to be liable, and to stand upon the very terms of his contract." 2 Parsons Contracts 17.

Upon the precise question of the effect of an increase of the ad damnum upon a bond previously executed there is a conflict of authority. The majority of the cases hold the sureties are not discharged. Thus in *New Haven Bank* v. *Miles,* 5 Conn. 587, where the defendant had been arrested in a civil action and the bail bond was conditioned only for his appearance in court, an increase from $600 to $1200 was held not to discharge the sureties, the court holding that they assumed the risk of all amendments allowed by statute. In *Carr & Hobson* v. *Sterling,* 114 N. Y. 558, another case of arrest on civil process, the undertaking provided that the defendant "shall at all times render himself amenable to any mandate which may be issued to enforce final judgment against him in the action." The ad damnum was in-

creased from $7000 to over $13,000 and after judgment by default the sheriff returned "defendant not found." The surety was held liable, but there is no distinction taken between the rights of the surety and those of the principal. In these two cases there was no undertaking in the bond to pay the amount of the judgment recovered.

In *Hare* v. *Marsh,* 61 Wis. 435, an amendment of the ad damnum in the justice's court on an action of tort to an amount in the Circuit Court beyond the justice's jurisdiction was held not to release the surety on the bond given to stay execution pending the appeal, the undertaking of the bond being to pay any judgment remaining unsatisfied. The court says: "The undertaking presuppooses the exercise of such authorized judicial powers as should be called into action in the case. The contract was impliedly, if not expressly, with reference to such exercise of judicial power." Exactly the opposite result was reached in *Evers* v. *Sager,* 28 Mich. 47, although there is a dictum to the effect that the sureties would have been bound had the amendment been within the power of the court irrespective of stipulation. In Massachusetts a statute (Pub. Sts. c. 167, sec. 42) is construed as binding sureties in the event of amendments, provided it appears that the amended cause of action is the same as that relied on by the plaintiff when the action was commenced, however the same may be misdescribed. If the sureties are notified of the proposed amendment they are bound by its allowance, subject to exception or appeal; if not notified they are still liable if it appears that the adjudication was correct, and the court may go outside the record and receive oral testimony as to what was the cause of action intended to be relied on when the suit was commenced. *Driscoll* v. *Holt,* 170 Mass. 262. The issue under this statute is therefore merely whether a new cause of action has been introduced and decisions upon one side or the other (*Prince* v. *Clark,* 127 Mass. 599; *Townsend Bank* v. *Jones,* 151 Mass. 454) are not helpful. In Maine an increase of the ad damnum upon the same demand discharges the sureties upon a bond given with reference to the action (*Langley* v. *Adams,* 40 Me., 125), and the same principle was applied where the creditor,

without amendment, took judgment in excess of his ad damnum. *Ruggles* v. *Berry*, 76 Me. 262.

The only principle that can be deduced from the cases holding the sureties liable is that sureties on judicial bonds, as distinguished from sureties on private contracts or undertakings, contract with knowledge of the power of the court, under statute or otherwise, to make amendments, and must be presumed to take the risk of such amendments even if their liability is thereby increased. If this principle is sound it would be of much wider application than cases of the increase of ad damnum, yet outside that field it is seldom recognized and the distinction generally denied. Brandt, Suretyship, Sec. 511; *Reese* v. *United States*, quoted above. One of the most common amendments under statutes is the substitution of new parties, and yet this is generally held to discharge the sureties *Richards* v. *Storer*, 114 Mass. 101; *Tucker* v. *White*, 5 Allen 322. Contra, *Jamieson* v. *Capron*, 95 Pa. St. 15. The correction of an error in the description of the property replevied as the substitution of "north-east" for "south-east" in the quarter section from which logs were cut is well within the power of amendment, but discharges the sureties. *Bolton* v. *Nitz*, 88 Mich. 354. The surety on a judgment for alimony or on a temporary injunction knows that it may be modified by the court, yet he is discharged by such modification. *Sage* v. *Strong*, 40 Wis. 575; *Tyler Mining Co.* v. *Last Chance Mining Co.*, 90 Fed. 15. Sometimes, of course, the language of the bond, by fair construction, shows that subsequent increase of risk has been assumed as where the condition that a distiller "shall in all respects faithfully comply with all the provisions of law," etc., has been held to signify an intention to stipulate that the principal should comply with duties subsequently imposed by law. *United States* v. *Powell*, 14 Wall. 493.

The rule of strictissimi juris has been said to be a stringent one, and liable at times to work a practical injustice. With regard to subsequent amendments in judicial proceedings we should hesitate to apply it except when it resulted in a variation of risk which was plainly outside the contract of the sureties. Even an increase of the ad damnum might not have that effect,

as when the cause of action is certain drafts with interest thereon, and the ad damnum is increased to cover interest subsequently accruing. *Townsend Bank* v. *Jones*, 151 Mass., 454. Here the surety was fairly apprised of his risk at the outset and the amendment was to satisfy legal formality. The case at bar is quite different. It is imposible to read the bond without inferring that the value therein recited, fixed by the plaintiff itself, was part of the material inducement upon which the sureties assumed the risk. The responsibility for "such sum as may for any cause be recovered against the defendant" evidently refers to recovery upon the action recited. *The Oregon*, 158 U. S., 186, 206. The risk in this case was to be responsible for the return of property, of a specified value, or in default thereof for the payment of a judgment for its value, together with damages, interest and costs. The penal sum of the bond, $30,000, was the limit of the risk, not the risk itself. The subsequent amendments were not the exercise of a judicial power for which neither party was responsible, but the voluntary act of the obligee, the allowance by the court being formal and largely controlled by statute. R. L., Sec. 1738. By these amendments, in this case made after the death of the surety whose estate is now sought to be charged, the plaintiff increased the risk of the sureties nearly fifty per cent., and actually obtained a judgment for $22,000 with damages and costs. We are of the opinion that this increase of liability was outside the contract of the sureties and that they are discharged.

The exception to the overruling of defendants' motion for judgment non obstante veredicto, in so far as it is based upon their discharge from liability by the plaintiff's amendments of value, is sustained. The remaining grounds of the motion and the remaining exceptions not necessarily involved are not passed upon.

Dissenting Opinion of Wilder, J.

The surety in this case agreed to pay "such sum as may, for any cause, be recovered against" Hutchins. The limit of that obligation was stated in the bond to be $30,000. Plaintiff having recovered against Hutchins the sum of $22,000, the surety is bound by his obli-

gation to pay that sum. The conclusion of the majority of the court that the surety is discharged is based on the assumption that the surety's risk was increased by the amendments in the replevin action raising the value of the property from $15,000 to $22,000. That assumption very properly requires that the risk or obligation of the surety should be stated differently from what it is in the bond under the statute. If the obligation of the surety was as stated by the majority, then the conclusion they reach logically follows. If, on the other hand, it was as stated in the bond and in the statute, that conclusion does not and cannot logically follow. To be sure the obligation and the limit of that obligation are different things. The obligation is to pay such sum as may be recovered, while the limit provides that in no event can that sum, so far as the surety is concerned, be more than $30,000.

Srom the cases referred to by the majority it appears that the courts in Massachusetts, Connecticut, New York, Wisconsin, Pennsylvania and, possibly, Michigan, to which should be added Ohio, Indiana and Vermont, (*Jaynes* v. *Platt*, 47 Oh. St. 262; *Sherry* v. *Bank*, 6 Ind. 397; *Wright* v. *Brownell*, 3 Vt. 436,) would hold that in this case the surety was not discharged, while in Maine it would be held the other way. The two cases of *Sage* v. *Strong*, 40 Wis. 575 and *Tyler Mining Co.* v. *Last Chance Mining Co.*, 90 Fed. 15, are easily distinguishable from the case at bar. In the first one the surety obligated himself to see that a judgment which had already been rendered would be paid, while in the second case the obligation of the surety was to pay any damages caused by an injunction which had already issued. The surety in each case knew when he signed the bond that the judgment or injunction could be modified by the court, but he never agreed to be bound by a modification any more than he agreed to be bound in case a different judgment or injunction was thereafter entered. That is something entirely different from the case where a surety knows when he executes the bond that he is to be liable if at all to pay a judgment to be rendered in the future and, it must be remembered, in the usual course of procedure, which would include amendments of the kind made.

> The majority opinion being in my opinion contrary to both principle and the great weight of the decided cases, I am compelled to dissent therefrom.

To the entry of judgment on the remittitur from the Supreme Court of the Territory in conformity with the opinion of the majority the plaintiff, William W. Bierce, Limited, duly excepted "on the ground that the same is contrary to law", and such exception was formally allowed and noted of record by the court (R., 127).

Thereafter, plaintiff's bill of exceptions (R., 8-128) having been duly approved by the trial court (R., 128), upon application of said plaintiff a writ of error "for the removal of the record, proceedings and judgment in the original cause, from the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, to the Supreme Court of the Territory of Hawaii" was duly issued and duly served (R., 3, 7).

The substantial error formally assigned "at the time of procuring said writ of error" was that said Circuit Court had

> "erred in rendering judgment *non obstante veredicto* in said cause in favor of the defendants and against the plaintiff, and in adjudging that the judgment entered in said cause on the verdict on the 29th day of May A. D. 1908, be vacated and set aside, and in adjudging that the plaintiff take nothing by its writ and that the defendants recover from the plaintiff their statutory attorneys' fees and costs of suit as taxed." (R., 4).

The record on this writ of error having been duly docketed in the Supreme Court of the Territory, a *pro forma* judgment of affirmance was entered by that court (R., 174) but same was subsequently "vacated, annulled and set aside" and the hearing of the cause was "continued till the return of Chief Justice Hartwell," (R., 176).

The defendants in error subsequently moved "to quash said writ of error" because it sought "to review proceedings in the Circuit Court done in exact accordance with the mandate of this (Territorial Supreme) Court," and because "the judgment of this (Territorial Supreme) Court rendered May 5, 1909, and the opinion of the court thereon filed April 12, 1909, is the law of this case, binding upon the plaintiff and decisive of the questions herein". (R., 177).

This motion having been argued by counsel for the respective parties (R., 180-182) was, upon consideration by the court denied (R., 766) and the main case having been submitted upon briefs, the judgment of the Circuit Court for the First Judicial Circuit was affirmed "in all things and respects" * * * notwithstanding the said matters and things therein assigned for error." (R., 767).

The opinion of the Territorial Supreme Court on overruling the motion to quash said writ of error and affirming said judgment, is as follows:

Opinion of the Court by Perry, J.:

This case was before us in April, 1909, on a bill of exceptions brought by the defendants. 19 Haw. 398. A full statement of the case will be found in our former opinion. The conclusion of that opinion and the order there contained was, "the exception to the overruling of defendants' motion for judgment non obstante veredicto in so far as it is based upon their discharge from liability by the plaintiff's amendments of value is sustained. The remaining grounds of the motion and the remaining exceptions not necessarily involved are not passed upon." A petition for rehearing was filed and denied. Pursuing the ordinary practice, a communication was thereupon sent by the clerk to the court appealed from, notifying that tribunal of the conclusion thus reached by this court but containing no express order as to future proceedings. Subsequently the Circuit Court entered judgment for the defendants non obstante veredicto and for $1097.22 statutory attorneys'

fees and costs. Plaintiff thereupon took out a writ of error from this court assigning as error the entry of the judgment non obstante. Defendants move to dismiss this writ on the grounds (*a*) that the record upon the writ does not present the record upon which the former decision of this court was based but only parts of the same, and (*b*) that the writ brings up no proceedings subsequent to the former decision of this court other than those had in exact accordance with such decision.

After the filing of the motion to dismiss plaintiff moved for a writ of certiorari commanding the lower court to certify to this court as a part of the record upon the writ of error the former bill of exceptions and certain other documents the omission of which is referred to as one of the grounds of the motion to dismiss. Some of these documents had been returned to the Circuit Court from this court after the former decision and others are still in this court. The statute, R. L. Sec. 1873, itself makes the bill of exceptions and the other documents a part of the record on this writ of error and it is in the interest of a correct determination of the cause in the Supreme Court of the United States, even if not necessary on this writ in this court, that the record should be complete. It was therefore ordered upon the presentation of the motion for the writ of certiorari that all documents in the case still in this court be transferred to and made a part of the record upon this writ and that the Circuit Court be directed to certify the remaining documents.

As to the motion to dismiss. The judgment non obstante was not specifically ordered by this court although it was a necessary result of our former opinion. It was the judgment of the Circuit Court in form and in fact although it was in precise accordance with our views and conclusion, but whether it was entered in accordance with our former opinion is something which cannot be determined without entertaining the present writ and thereunder examining the record brought up by it of the proceedings had in the lower court. It is a contradiction in terms to say that we find that the proceedings had were in compliance with our former conclusion and at the same time to say that the party is not entitled to the writ and that the latter must be dis-

missed. A dismissal is something which happens in limine and without a consideration of the merits. Even those courts which hold that a dismissal is the proper course rather than an affirmance of the judgment below entertain jurisdiction under the writ and reverse the action taken below if they find that it was not in accordance with the former mandate. See, for example, Stewart v. Salamon, 97 U. S. 361, 362; Railroad v. Anderson, 149 U. S. 237, 242; Cook v. Burnley, 11 11 Wall. 672, 674; Browder v. M'Arthur, 7 Wheat. 58; Roberts v. Cooper, 20 How. 467, 481; Supervisors v. Kennicott, 94 U. S. 498, 499; The "Lady Pike," 96 U. S. 461, 462. The correct procedure, on reason, would seem to be to entertain jurisdiction and either affirm or reverse the judgment were appealed from. What questions are open to reexamination on such a writ is another matter. The mere fact, if such be the course adopted, that upon such a writ no reexamination is had upon issues arising prior to the entry of judgment and disposed of on a first appeal will effectively discourage an abuse of process in the taking of second and third appeals.

That this is the better rule appears even more clearly when we consider the class of cases where the circumstances are as they are in the case at bar.

By the act of March 3, 1905 (33 Stat. at Large, p. 1035), it was enacted that "writs of error and appeals may also be taken from the Supreme Court of the Territory of Hawaii to the Supreme Court of the United State *in all cases* where the amount involved, exclusive of costs, exceeds the sum or value of $5000." Congress clearly contemplated that appeals should lie *in all cases*, within the prescribed monetary limit, in which by a decision final in Hawaii the Supreme Court of Hawaii should determine the law, or in which, being within its jurisdiction, it should be asked to so determine the law. A decision by this court, such as was rendered in the case at bar, upon questions arising under a bill of exceptions is not final and appealable within the meaning of the act of 1905. This has been definitely determined by the Supreme Court of the United States. Cotton v. Hawaii, 211 U. S. 162, 170, 174, 175; Hutchins v. Bierce, 211 U. S. 429; Spreckels v. Brown, 212

U. S. 208. It cannot be said in this case that the plaintiff has waived its right to place itself in a position to enable it to appeal to the Supreme Court of the United States, for the former bill of exceptions was not brought by it but by its opponent. The plaintiff at that time was not aggrieved. The judgment of the lower court stood in its favor. It was aggrieved by our decision on the exceptions but had no right of appeal therefrom. Now for the first time the judgment of the Circuit Court stands against it. To hold that a writ of error lies to review the judgment non obstante, however narrow the reviewable issues may be in *this* court, is to further the intent of Congress as expressed in the act of 1905, while to hold the opposite is to nullify the provisions of that act and to deprive parties of the right to a review in the Supreme Court of the United States in a large class of cases, without any waiver and purely in consequence of the act of an opponent in choosing his method of review in the Supreme Court of Hawaii. At best it is a choice in a matter of mere procedure. That method is to be preferred which carries into effect the act of Congress. While it is true that this court should neither acceleratae nor retard appeals from its decisions, it should nevertheless so act as not to deprive parties by its own act or permit them to be deprived by the act of an opponent of a right of appeal secured to them by congressional legislation.

It is true that in a number of cases the Supreme Court of the United States has adopted the procedure of dismissing second appeals and writs when they are simply taken from judgments and decrees entered in conformity with an earlier mandate of the appellate court, and other courts likewise have so held. In none of those cases, however, was the first adjudication by a court of intermediate appeal and non-appealable to a court of last resort and therein lies an important distinction and one which requires the adoption of a rule contrary to that followed by the Supreme Court of the United States. But even in the latter tribunal instances are not wanting where the judgment appealed from has been affirmed and the appeal or writ not dismissed. See, for example, Supervisors v. Kennicott, supra; The "Lady Pike," supra; Washington v. Stewart, 3 How. 413, 425, 426.

See also Lathrop v. Knapp, 37 Wis. 307; Fire Department v. Tuttle, 50 Wis. 552.

Again, our statute on writs of error, R. L. Sec. 1869, contemplates that writs shall be allowed to any and all judgments of the Circuit Court, and while in this instance that court may have felt under compulsion to enter a judgment non obstante the latter was, nevertheless, its judgment. The plaintiff is entitled, as of right, to the issuance of the writ.

In *Kealoha v. Castle*, 17 Haw. 415, on a writ of error raising no questions other than those already decided upon reserved questions this court affirmed the decree appealed from, and the Supreme Court of the United States, affirming on the merits our decree, said nothing by way of disapproval of the practice. In *Notley v. Brown*, 17 Haw. 455, relied upon by the defendants, the case first came to this court on a bill of exceptions. The exceptions were overruled. Subsequently the same appellant brought a writ of error, in the same case, assigning as error the same matters decided on the exceptions and also certain proceedings had in the trial court after the remaining order and in conformity with it. The writ was dismissed. The majority is of the opinion that that case is distinguishable from this, in that there the same party attempted to review the same questions a second time in the same case, in substantial conflict with the rule of election laid down in *Ferrira v. Rapid Transit Co.*, 16 Haw. 406, while here plaintiff for the first time is attempting to have reviewed a certain question which the statute gives him a right to do and which cannot be denied by this court.

As to how far, if at all, an appellate court is at liberty on a second appeal from a judgment entered in pursuance of its mandate on a first appeal to re-examine on the merits the questions already considered and decided courts are divided. The great majority, including the Supreme Court of the United States, take the view that a second appeal or writ brings up for review only the proceedings had in the lower court subsequent to the earlier mandate of the appellate court, and that on such appeal no re-examination may be had of matters occurring prior to the entry of such decree. The law as declared upon the first appeal is said to be "the law

of the case" binding upon the appellate court which declared it as well as upon the inferior court. This view is based, sometimes upon the consideration ut sit finis litium, the argument being that if parties are to be permitted to take out appeals to secure a review of law once decided there never can be a certain end to the litigation, and sometimes on the theory that it is not within the power of the appellate tribunal to review its own decisions even though it be within its power to review the decisions of lower tribunals,—that the law creating the appellate court gives it the power last mentioned but not the first. Sometimes, again, it is based on the doctrine of res judicata. These reasons appear to other courts not to be entirely satisfactory. It is well, indeed, say the latter, that there should be an end to litigation, but far better that occasionally that end be somewhat delayed than that a manifest error should be perpetuated. Concerning the alleged lack of power, it is similarly said that the real question which arises on the second writ is, "Is the judgment appealed from correct in law?" and the correct view that, if it is not, the appellate court, still considering the same case, still having before it the same parties and no final adjudication or execution having yet been rendered or issued, has the power to correct its error. Continuing, the weakness of the attempt to regard the former ruling as res judicata is said to lie in the fact that it is not a final judgment and that it is elementary that that doctrine is always predicated upon final judgments between the parties. On the other hand it can be said, in favor of the majority rule, that nothing substantial can be gained in the securing of right and justice by permitting a second or a third reopening of an argument instead of regarding the matter as closed after the first opinion with the usual right to a rehearing under the rules of court,—that it is as human to err on a second appeal as it is to err on a first appeal.

A minority of the state courts take the view that, while ordinarily an opinion once declared concerning the law should be thereafter adhered to by the appellate as well as other tribunals, still the rule is not an inflexible one and may be departed from where the prior opinion is manifestly erroneous. *Hastings* v. *Foxworthy*, 34 L. R.

A. 321 (Neb.) contains the best considered opinion to this effect. The other states adopting this view are Missouri, Utah and Texas and, in some of their decisions, Connecticut, New York, and Ohio. Which is the better doctrine need not, in the opinion of the majority, be determined in this case, the minority being of the opinion that the power of re-examination exists and that the point is necessarily involved. If the question decided on the bill of exceptions is not now open for re-examination, the judgment below must be affirmed. If, on the other hand, it is within our power to re-examine, the same result is reached. The matter was on the first appeal very carefully considered, after able and exhaustive presentation by counsel. No new argument on the merits is now advanced. It is not contended that any controlling decisions or principles were overlooked. The court is simply asked to study the issue anew, on practically the same briefs (no oral argument is presented) and to endeavor to come to the opposite conclusion. The only substantial hope of a reversal lies in the fact that since the former opinion was rendered, the personnel of the court has changed. This of itself is not sufficient to justify a re-examination. That degree of certainty which is desirable in the law forbids that a matter once adjudicated be reopened for such a reason as this.

The motion to dismiss the writ is denied and the judgment non obstante is affirmed."

It is to review the final judgment of the Territorial Supreme Court, entered in this case on the 23d day of November, A. D. 1909 (R., 767), pursuant to the above-quoted opinion of the court, delivered by Perry, J., on the 6th day of November, A. D. 1909, that the writ of error in this case has been sued out and perfected.

The amount involved is in excess of $5,000.00 and prior to the allowance of said writ of error by the Chief Justice of the Supreme Court of the Territory of Hawaii (R., 769) the plaintiff in error had duly filed in that court its assignment of errors relied upon to secure a reversal of the judgment (R., 769-771).

Although the assignments of errors filed are nine (9) in number they are all reducible to the single proposition that the Supreme Court of the Territory of Hawaii erred in affirming the judment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, vacating and setting aside the judgment of said Circuit Court entered in said cause on the 29th day of May, A. D. 1908, on the verdict of the jury found in favor of the plaintiff, William W. Bierce, Limited, and against the defendants, and entering judgment notwithstanding said verdict in favor of the defendants, William Waterhouse and Albert Waterhouse, executors, etc., of Henry Waterhouse, deceased, and against said plaintiff, for the sum of $1,097.22, costs.

Jurisdiction.

The jurisdiction of the Supreme Court of the United States to review the final judgments of territorial courts is found in the act of Congress approved April 7, 1874, entitled "An Act Concerning the Practice in Territorial Courts and Appeals Therefrom" (18 Stats. L., 27, chap. 80), the second section of which declares:

> "That the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal." * * *
>
> See Apache *vs.* Barth, 177 U. S., 538, 541.
> Armijo *vs.* Armijo, 181 U. S., 558, 561.

The act of Congress of April 30, 1900 (31 Stats. L., 141, chap. 339), entitled "An Act to Provide a Government for the Territory of Hawaii," provides, among other things:

> "SEC. 81. That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may

from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided." * * *

"SEC. 86. * * * The Laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii." * * *

The act of March 3, 1905, entitled "An Act to Amend Sections 56, 80, and 86 of 'An Act to Provide a Government for the Territory of Hawaii,' approved April 30, 1900" (33 Stats. L., 1035), provides:

"SEC. 3. That section eighty-six of the aforesaid act be amended by adding the following at the end of said section: '*Provided,* That writs of error and appeals may also be taken from the supreme court of the Territory of Hawaii to the Supreme Court of the United States in all cases where the amount involved, exclusive of costs, exceeds the sum or value of five thousand dollars.'"

"SEC. 4. That this act shall take effect and be in force from and after its passage."

The act of March 3, 1909, entitled "An Act to Amend Section Eighty-six of An Act to Provide a Government for the Territory of Hawaii, to Provide for Additional Judges, and for Other Judicial Purposes" (35 Stats. L., 838), provides:

"That section eighty-six of the act approved April thirtieth, nineteen hundred, entitled 'An Act to provide a government for the Territory of Hawaii,' be, and the same is hereby, amended so as to read as follows:

"SEC. 86. * * * The laws of the United States relating to appeals and writs of error, removal of causes and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii. * * * *Provided,* That writs of error and appeals may also be taken from the Supreme Court of the Territory of Hawaii to the Supreme Court of the United States in all cases where the amount involved, exclusive of costs, exceeds the sum or value of five thousand dollars."

By these amendatory acts the jurisdiction of this court has been extended to embrace all cases, irrespective of the nature of the questions presented, "where the amount involved, exclusive of costs, exceeds the sum or value of $5,000.00."

Bierce *vs.* Hutchins, 205 U. S., 340, 344.
Cotton *vs.* Hawaii, 211 U. S., 162, 169.

In the case at bar the trial was to a court and jury. The judgment of the circuit court on the remittitur from the Supreme Court of the Territory of Hawaii in favor of the defendant, *non obstante veredicto,* was entered May 29, 1909 (R., 126) and exception thereto was filed by plaintiff and allowed the same day (R., 127). Plaintiff's bill of exceptions taken on the entry of said judgment was approved and filed June 28, 1909, and a writ of error removing "the records, proceedings, and judgment in the original cause, from the Circuit Court of the First Judicial Circuit of the Territory of Hawaii to the Supreme Court of the Territory of Hawaii, was issued June 29, A. D. 1909 (R., 3). November 6, 1909, the Supreme Court of the Territory handed down a written opinion, concluding, to-wit: The motion to dismiss the writ of error is denied and the judgment *non obstante* is affirmed (R., 766), and on the 23d of November, 1909, said Supreme Court entered formal judgment affirming the judgment *non obstante veredicto* entered May

29, 1909, "in all things and respects, * * * notwithstanding the said matters and things therein assigned for error" (R., 767).

To review this final judgment of the Supreme Court of the Territory the writ of error from this Court, dated December 21, 1909, was allowed (R., 773), and duly perfected.

The amount in dispute, exclusive of costs, greatly exceeds $5,000.00.

Assignment of Errors.

The Supreme Court of the Territory of Hawaii erred in sustaining the exception of defendants William and Albert Waterhouse, executors under the will and of the estate of Henry Waterhouse, deceased, to the action of the circuit court in overruling said defendants' motion for judgment *non obstante veredicto.*

The Supreme Court of the Territory of Hawaii erred in affirming the judgment of May 29, 1909, of the circuit court for the first judicial district of Hawaii vacating and setting aside its prior judgment of May 29, 1908, entered on the verdict of the jury in favor of plaintiff and against said defendants, and adjudging and ordering that notwithstanding said verdict of the jury the plaintiff should take nothing by its writ, and that said defendants should recover of and from said plaintiff their costs, taxed at the sum of one thousand, ninety-seven and 22/100 ($1,097.22) dollars.

Merits.

The propriety of the practice of the courts of the Territory of Hawaii, exemplified in this case, of entering judgment *non obstante veredicto* on motion of the defendant,

was not questioned below and, in any event, probably would not be reviewable by this Court.

Matters of practice in territorial courts are based upon local statutes and local rules or methods of procedure. This court is not disposed to review the course of action or the decisions of the Territorial Supreme Courts in such matters.

Armijo *vs.* Armijo, 181 U. S., 558, 561.
Ankeny *vs.* Clark, 148 U. S., 345, 354-355.
Sweeney *vs.* Lomme, 22 Wallace, 208.

The "decision" of the Supreme Court of the Territory of Hawaii, dated May 5, 1909, sustaining defendants' exception to the action of the trial court in overruling their motion "for judgment *non obstante veredicto* in so far as it is based upon the discharge from liability by plaintiff's amendments of value," did not constitute a final judgment and was not subject to review by this Court.

Cotton *vs.* Hawaii, 211 U. S., 152.
Hutchins *vs.* Bierce, Ltd., 211 U. S., 429.

It is otherwise with respect to the "judgment" of said Supreme Court affirming "in all respects" the judgment of the circuit court dated May 29, 1909. Viewed in any aspect and tested by every rule of decision, the judgment of the Supreme Court of the Territory, dated November 23, 1909, is "final" and is subject to review in this Court.

On writ of error from this Court to review said final judgment of November 23, 1909, the action of the territorial supreme court in making and entering said "decision," as well as its action in entering said final judgment, may be reviewed, and if error be found in either action it may be corrected here.

United States *vs.* Denver & R. G. R. R. Co., 191 U. S., 84, 93.
Mendenhall *vs.* Hall, 134 U. S., 559.

But this Court cannot review any action of the trial court involved in "exceptions" or even on appeal to the supreme court of a territory, the propriety of which action was not passed upon by the Territorial Supreme Court.

San Pedro, &c., Co. *vs.* United States, 146 U. S., 120.

The inquiry of this Court is limited to the rulings of the Supreme Court of the Territory; it is its judgment, not that of the trial court, which is under review.

And it is equally well settled that the necessary effect of the provisions of section 2 of the act of April 7, 1874, chapter 80, *ubi supra,*

> "is that no judgment or decree of the highest court of a Territory can be reviewed by this court in matter of fact, but only in matter of law."
>
> Idaho, &c., Land Imp. Co. *vs.* Bradbury, 132 U. S., 509.

As observed by Mr. Chief Justice Waite, delivering the opinion of the Court in *Hecht vs. Boughton,* 105 U. S., 235, 236:

> "We are not to consider the testimony in any case. Upon a writ of error we are confined to the bill of exceptions or questions of law otherwise presented by the record, and upon an appeal to the statement of facts and rulings certified by the court below."

In either class of cases, whether equitable or legal, coming to this court from a territorial supreme court after a hearing or trial on facts, the evidence at large ought not to be brought up. The authority of this court in all such cases is limited to determining whether the lower court's findings of fact, if any there be, support its judgment or decree, and to whether there is any error in rulings duly excepted to in the admission or rejection of testimony, which exceptions have been properly preserved of record. This court is with-

out authority to consider the weight of evidence or its sufficiency to support conclusions of the territorial courts.

Apache County *vs.* Barth, 177 U. S., 538.
Harrison *vs.* Perea, 168 U. S., 311.
Bear Lake, &c., Waterworks Co. *vs.* Garland, 164 U. S., 1.
Haws *vs.* Victoria Copper Mining Co., 160 U. S., 303.
San Pedro, &c., Co. *vs.* United States, 146 U. S., 130.
Stringfellow *vs.* Cain, 99 U. S., 610.

Even in cases brought up by appeal where the record presents no statement of facts to enable this court to determine whether the facts found, or supposed to have been found, are sufficient to sustain the judgment, and no exceptions taken to rulings in the admission or rejection of evidence have been properly preserved of record, and properly brought before this court, there is nothing for this court to review.

Salina Stock Co. *vs.* Salina Irrigation Creek Co., 163 U. S., 109.

"We are not at liberty," said Mr. Justice Matthews, speaking for the Court in *Neslin vs. Wells,* 104 U. S., 429, "to consider anything as embraced in the statement of facts required by the statute, except the special findings of the district court adopted by the Supreme Court in its general judgment of affirmance. This excludes the consideration of exceptions taken in the district court in the course of the trial and noted in the statement filed in that court as the basis of the motion for a new trial, and leaves, as the sole question for determination here, whether the facts as found justify the decree sought to be reversed."

The voluminous transcript of record in this case may be divided, without difficulty, into two distinct parts, the one consisting of pages 1 to 182 and pages 743 to 788, all included, wherein will be found the record proper on the writ

of error now before this Court. The other, consisting of pages 185 to 743, inclusive, contains the bill of exceptions of the defendants, William and Albert Waterhouse, executors, etc., together with the entire transcript of the evidence and various exhibits and other matters made part of said bill of exceptions by reference. That bill of exceptions was brought to review in the Supreme Court of the Territory certain exceptions specified therein to the action of the circuit or trial court in the course of the trial which led up to the entry in that court of the judgment of May 29, 1908, on the verdict of the jury in favor of the plaintiff, William W. Bierce, Limited. As these exceptions only presented for review to the Supreme Court of the Territory particular rulings of the trial court, and did not purport to present to the former court the whole record in the cause, the order or "decision" entered by the Supreme Court sustaining the exception to the overruling of defendants' motion for judgment *non obstante veredicto,* in so far as it is based upon the discharge from liability by plaintiff's amendments of value (R., 125), was in no sense a final judgment and consequently was not open to review here (Cotton *vs.* Hawaii, 211 U. S., 162). Except in so far as said bill or portions thereof have been preserved by the bill of exceptions on the present writ of error (see bottom of record, page 113 and top of 114), it should not be looked to or consulted by this Court.

Said bill of exceptions and accompanying exhibits were properly a part of the record in the Supreme Court of the Territory (see section 1873, Revised Laws of Hawaii, 1905; Meheula *vs.* Pioneer Mill Co., 17 Hawaii, 91); but except as preserved in small part in the bill of exceptions on the writ of error from this Court, as next above noted, it can form no part of the record here.

Neslin *vs.* Wells, 104 U. S., 429.

Assuming for the purposes of argument that all the matters of law raised or reserved in or by defendants'

"motion for judgment *non obstante veredicto*" are open for consideration by this Court on the present writ of error, we nevertheless think it orderly to first consider that particular ground of said motion, viz., ground No. 7, which alone was made the basis of the "decision" of the Supreme Court of the Territory, in obedience to which decision the trial court acted in setting aside its judgment in favor of plaintiff in error here entered on the verdict of the jury, and subsequently entering judgment for defendants in error *non obstante veredicto.*

The Supreme Court of the Territory of Hawaii erred in ruling that the sureties on the bond sued on were discharged from liability by the amendments of the averments of the complaint in the replevin suit, whereby the alleged value of the property in question was increased from $15,000 to $22,000. The amendments were properly made during the course of the trial by leave of court, in order to make the pleadings correspond with the proofs, and the *ad damnum* as increased was within the penalty of the bond. No new cause of action was introduced by the amendments, and the liability of the sureties was not thereby increased.

The statute of Hawaii under which the amendments in question were made is substantially the same as that found in most of the States. It is as follows:

> "SECTION 1145. Whenever a plaintiff in an action shall have mistaken the form of action suited to his claim, the court or judge, on motion, shall permit amendments to be made on such terms as it shall adjudge reasonable; and the court or judge may, in furtherance of justice, and on the like terms, at the trial or on appeal, or at any other stage before or after judgment, allow any petition or pleading or process or proceeding to be amended by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations ma-

terial to the case, or, when the amendment does not substantially change the claim or defense, by conforming the pleadings or the proceeding to the facts proved."

Session Laws of Hawaii (1903), 366.
Revised Laws of Hawaii (1905), § 1738.

On the appeal of the defendant, Clinton J. Hutchins, trustee, to the Territorial Supreme Court in the replevin suit on bill of exceptions, he excepted to the action of the trial court in allowing the plaintiff to make the amendments in question; but the Supreme Court overruled his exception, saying:

"The only exceptions to rulings prior to the judgment on which the defendant relies in argument are (1) to allowing the plaintiff to amend its complaint by changing the averment of the value of the property, first from $15,000 to $20,000, and then to $22,000. * * *

"The amendments were properly allowed under the statute (Sec. 1738, R. L.). Before the property was delivered to the plaintiff the defendant obtained a return of it to himself upon his statutory bond in double the value of the property as originally stated by the plaintiff. It does not appear that the defendant's rights were affected by the amendment increasing the value." * * *

Bierce *vs.* Hutchins, 18 Haw., 511, 522.

For reasons stated in a subsequent part of this argument it would seem that the sureties on the redelivery bond, as well as Clinton J. Hutchins, trustee, their principal, with whom they were in privity, and who represented them in the replevin suit, were concluded by this adjudication respecting the propriety of the amendments in question.

As a general rule, amendments to the complaint or declaration may be made in actions of replevin, when authorized by statute, and the *ad damnum* increased, without affecting

the liability of the sureties on the replevin bond or redelivery bond, so long as no new cause of action is introduced by the amendment whereby the liability of the surety would be increased beyond the amount of the penalty named in the bond.

It is so held in Massachusetts, Michigan, Wisconsin, Pennsylvania, Indiana, Vermont, Ohio, and other States.

The application of the rule is well illustrated in the early Massachusetts case of Wood *vs.* Denny, 7 Gray, 540. Two writs of *scire facias* against bail were tried together before the chief justice. In one case, the original declaration consisted of the money counts *in assumpsit*. Later the declaration had been amended by filing new counts declaring specially on certain promissory notes. The court ruled that no new cause of action was introduced by the additional counts, and that the bail was not thereby discharged. In the opinion of the court it is said:

> "The notes declared on in the new counts, when given in evidence, would have supported the money counts. The amendment therefore did not affect the liability of the bail or of the principal. The judgment was for the same cause of action, and for the same amount that it would have been if no amendment had been made. Brooks *vs.* Clark, 2 D. & R., 148."

In the other case there had been added by amendment to the money counts a new count on a guaranty of a debt due from a third person to the plaintiff which the court held was not for the same cause of action as the money counts, and could not have been given in evidence under those counts.

In its opinion the court said:

> "As to the bail, we are of opinion that it discharged him from his undertaking. He became bail in an action for money had and received, money

lent and money paid, as set forth in the writ and declaration against the principal, and not in an action on a guaranty by the principal of the plaintiff's claim on another.

"The rule by which the court is to decide whether an amendment discharges bail or dissolves an attachment so as to let in subsequently attaching creditors is correctly stated by Mr. Justice Wilde as follows: Amendments in form merely will not dissolve an attachment or discharge bail. To have this effect the amendment must be such as to let in some new demand or new cause of action.' Haven *vs.* Snow, 14 Pick., 33, 34. Wight *vs.* Hale, 2 Cush., 493. See also Hayes *vs.* Morgan, 3 Mass., 210. In the case before us, the amendment did let in a new cause of action which was not known, even by the attorney until after the writ, declaration and arrest were made."

Townsend National Bank *vs.* Jones, 151 Massachusetts, 454, was an action against the sureties on a bond given to release attached property. The defendants claimed to be released on the ground that after the execution of the bond, and without notice to them, the plaintiff in the attachment suit had been permitted to amend his declaration. In the original declaration there was only one count declaring on a draft, but attached to the declaration were copies of four drafts. In the amended declaration the plaintiff declared in a separate count on each of the drafts, and annexed copies thereto as exhibits. The *ad damnum* in the original declaration and writ of attachment was $7,000; but before the execution of the bond, by consent of the defendant this amount was reduced to $6,000. Subsequently, on motion and without notice, the *ad damnum* in the original declaration was increased by amendment to the original amount, $7,000. The trial judge ruled that as a matter of law the effect of the amendment of the writ and declaration was to release the surety from liability and render a judgment for the defendant. The Supreme Court, in reversing this judg-

ment for error, quoted the statute relative to the amendment of pleadings, and, in part, said:

> "While the adjudication is conclusive on the principal, as the large power of amendment conferred on the court was known to the defendant who, in the case at bar, is a surety, he has no ground of complaint, nor is he discharged from his obligation if the amendment only describes the same causes of action—technically and accurately—which were imperfectly described in the declaration; but of which he had notice when he became a surety on the bond to dissolve the attachment on the plaintiff's goods. The surety cannot take advantage of formal defects made by the plaintiff in stating his case. Unless the effect of the amendment would be to impose on him a greater liability than he had originally assumed by letting in a new cause of action, he is not released because of its allowance. Fairfield *vs.* Baldwin, 12 Pick., 388. Wood *vs.* Denny, 7 Gray, 540. Ball *vs.* Claflin, 5 Pick., 303, 305. Haven *vs.* Snow, 14 Pick., 28, 33. Lord *vs.* Clark, 14 Pick., 223. Kellogg *vs.* Kimball, 142 Mass., 124. Doran *vs.* Cohen, 147 Mass., 342. Lanahan *vs.* Porter, 148 Mass., 596.
> * * *
>
> "Nor is the surety discharged by a mere change in the *ad damnum* named in the writ. The liability of the surety is for the penal sum in the bond, with interest. In fixing a penal sum in the bond to dissolve an attachment, he has limited his liability to that amount. So long as no new cause of action has been introduced, his rights have not been affected. He has consented to become responsible, to the amount of the penal sum in his bond, for which the plaintiff may recover upon the cause of action on on which his writ was brought, however the same might have been described. No recovery of a larger sum thereon can affect this liability. If a different and additional cause of action had been introduced into the plaintiff's writ, whether the *ad damnum* had been increased or not, the defendant would have ground of objection, unless it could be clearly shown that the plaintiff had recovered only on the original

> cause of action. The liability of the surety is similar to the liability of bail, and where this liability is not increased the increase of the *ad damnum* does not discharge the bail."

It would seem that a more authoritative precedent than the decision last cited could not be adduced in support of any proposition of law. It is to be noted that the opinion of the court consistently reviews and follows numerous former decisions of the same court, every one of which is found, upon examination, to state or reiterate the rule that a surety is not discharged by an amendment which merely increases the *ad damnum* to an amount within the penalty of the bond and introduces no new cause of action. We think the Massachusetts cases merit particular attention, for the reason indicated; especially in view of the seeming attempt in the majority opinion of the Territorial Supreme Court on exceptions to distinguish Townsend National Bank *vs.* Jones, *supra,* from the case at bar (Rec., 120).

Thus, it is said: "In Massachusetts a statute (Pub. Sts., ch. 167, sec. 42) is construed as binding sureties in the event of amendments, provided it appears that the amended cause of action is the same as that relied on by the plaintiff when the action was commenced, however the same may be misdescribed" (Rec., 120).

And again it is said: "The issue under this statute is, therefore, merely whether a new cause of action has been introduced and decisions upon one side or the other * * * are not helpful."

We find in the statute in question (quoted below) nothing directly or indirectly relating to the subject of binding sureties; nor do we find anything in the decisions of the Supreme Court of Massachusetts, above cited, which suggests that the court construes the statute as binding sureties. Sureties, under such circumstances, and in such cases, are obviously bound by virtue of their contracts, and not by

reason of such legislative acts as the Massachusetts statute in question, which is as follows:

> "SECT. 42. At any time before final judgment in a civil suit amendments may be allowed, on such terms as are just and reasonable, introducing a party necessary to be joined as plaintiff or defendant, discontinuing as to joint plaintiff or defendant, changing the form of the action, and in any other matter, either of form or substance in any process, pleading or proceeding, which may enable the plaintiff to sustain the action for the cause for which it was intended to be brought, or the defendant to make a legal defense."

The rule of the Massachusetts cases is buttressed by leading case of Jamieson *vs.* Capron, 95 Penn. St., 15, which involved an action against the surety on two property (redelivery) bonds given in two actions of replevin brought in the names of Henry P. Duncan, Samuel Duncan, and Stephen Duncan, executors of Stephen Duncan, deceased.

After the cases were at issue, on motions of the plaintiffs, the record in each case was amended by order of court, by striking out the words "executors of the last will and testament," and by substituting the words "heirs at law," and by adding the names of other heirs at law as plaintiffs.

The three plaintiffs who originally sued were, in fact, heirs-at-law of Stephen Duncan, deceased, and the mistake made in bringing the suit, which was corrected by the amendment appears to have been made in styling them as executors, instead of heirs. The court said:

> "There was no change in the cause of action. The basis of the claim, before as well as after the amendment, apepars to have been title derived from Stephen Duncan, deceased. The parties brought upon the record were not strangers as to the claim. They were joint heirs with the original parties, and all derived

title to the property in controversy from a common source.

"It follows, therefore, that the defendant had no available defense, either on the ground that the amendment was unauthorized or that it introduced a new cause of action. * * *

"When a person becomes surety for another in a judicial proceeding there is an implied understanding that it shall be conducted according to the provisions of law relating thereto. The statutes regulating amendments, as well as other incidents of trial, are as much a part of the contract in the contemplation of the parties thereto as if they were embodied in the condition of the bond. There is, and necessarily must be, this distinction between contracts of suretyship in ordinary business affairs and those connected with judicial proceedings. * * * So, in the present case, the plaintiff in error ,in becoming surety for the defendants in the actions of replevin, must be considered as having contracted with reference to the law applicable to the trial and final determination of the cases, and with the view of becoming responsible for the amount that might ultimately be adjudged against the defendant."

In Hare *vs.* Marsh, 61 Wisconsin, 435, a bond was given to stay execution on a judgment for $25 damages, and costs, rendered by a justice of the peace, pending an appeal from the judgment to the circuit court. The appeal bond was conditioned for the payment of the amount remaining unsatisfied if judgment be rendered against the appellant and execution thereon returned unsatisfied in whole or in part.

The circuit court granted plaintiff leave to amend the *ad damnum* clause in his complaint so as to claim $2,000 damages instead of $200; the latter being the limit of the jurisdiction of the justice.

The Supreme Court held that the surety was not released by the making of such amendment, saying:

> "Of course the action was triable in that court, the same 'as actions originally brought there.' (Sec. 3768, R. S.) Hence the pleadings were open to amendment in that court, the same as if the action had been originally brought there. The amendment here did not add any new cause of action, but simply authorized a larger recovery upon the same cause of action. * * * Having, by signing the undertaking, made himself liable for any judgment the plaintiff might recover in the circuit court, the surety cannot be released by the unexpected exercise of the proper and authorized judicial powers of that court. The undertaking presupposes the exercise of such authorized judicial powers as should be called into action in the case. The contract was impliedly, if not expressly, with reference to such exercise of judicial power. The judgment was conclusive against the surety under our statute. (Masser *vs.* Strickland, 7 Am. Dec., 668.) We must, therefore, under the provisions of our statute and the cases cited, hold that the surety as not released by reason of the increase of the amount claimed in the *ad damnum* clause of the complaint."

In an early Michigan case, Evers *vs.* Sager, 28 Michigan, 48, 52, it was held that the increase of the *ad damnum* beyond the jurisdiction of the justice of the peace, while unauthorized by statute, was cured by the stipulation of the defendant. In the opinion of the court, by Mr. Justice Cooley, it is in part said:

> "If the court had possessed the power to order or allow such an amendment, irrespective of the stipulations of the parties, the sureties would have been bound by its actions, because their obligation would be understood as contemplating a possible exercise of such power."

Merrick *vs.* Greely, 10 Missouri, 106, was an action brought for materials furnished in a proceeding against a boat In the original complaint it was averred that the ma-

terials were furnished on account of A. Asburn, who was described as "a part owner and husband of said boat." At a subsequent trial leave was obtained to amend the complaint by striking out the words descriptive of the person at whose instance the materials were furnished, and inserting in lieu thereof "agent of the owners of said boat."

There was a verdict and judgment against the boat, and judgment was also entered against the sureties, who, however, contended that they were discharged from liability on account of the amendment. The court said:

> "We do not see how the amendment affected the securities. No new cause of action was introduced by it. * * * Liability to the plaintiffs was not in anywise varied by it. * * * The principles on which amendments in cases like the present are allowed are clearly stated in the cases of Seely *vs.* Brown, 14 Pick., 177, and Ball *vs.* Claflin, 5 Pick., 303. These cases maintain that when no new cause of action is introduced by an amendment, and the liability of bail is not affected by it, it is always allowable."

In Hanna *vs.* International Petroleum Company, 23 Ohio St., 622, which was an action on a replevin bond, the sureties claimed exemption from liability on the ground that in the replevin suit the record was amended by the substitution of the International Petroleum Company as the defendant, in place of its agent, Edson, in whose possession was the property in question sought to be replevied. The court, in denying the contention of the sureties that they were discharged from liability, say:

> "We think that the substitution of the company as defendant, in place of its agent, Edson, did not release the sureties in the undertaking. By the terms of that instrument the sureties undertook that the plaintiff should duly prosecute 'his action aforesaid' and pay 'all costs and damages' awarded against him. The costs and damages here sought to be recovered

> were awarded 'against him,' and they were awarded against him in the 'same action.' It was a proper case for the change of parties; the change worked no prejudice to the rights of Pelletier."

To the same effect are New Haven Bank *vs.* Miles, 5 Connecticut, 587.

Carr *vs.* Sterling, 114 New York, 558.

The sureties on the redelivery bond were represented in the replevin suit by the defendant, Clinton J. Hutchins, trustee, and were identified with him in interest and claimed in privity with him so as to be concluded by the proceedings and judgment in that suit.

It should be borne in mind that when the deceased surety, Henry Waterhouse, first entered into contractual relations with the plaintiff, the latter had just brought a replevin suit for the recovery of possession of the goods in question, had given a replevin bond in the penal sum of $30,000 conditioned according to law, and had caused the high sheriff to seize the goods in question. The property had been levied upon by the sheriff and was in his possession, and thereby the plaintiff's rights were made secure. Under these circumstances the sureties, Henry Waterhouse and Arthur B. Wood, came forward and voluntarily gave to the sheriff the redelivery bond, conditioned for the delivery of the property, to William W. Bierce, Limited, if such delivery should be adjudged and for the payment of such sum of money as might, for any cause, be recovered against the defendant. They intermeddled in the pending litigation. They were not brought in, or invited in, but came into it voluntarily and by executing the redelivery bond in question caused the property to be returned to the defendant, thereby depriving the plaintiff of the property to which it was subsequently adjudged to be entitled.

In thus becoming sureties for the defendant, in the re-

plevin action, the defendants must be considered as having contracted with reference to the law applicable to the trial and final determination of such suits, including the statute of Hawaii, authorizing amendments such as are in question, and with the view of becoming responsible for the amount that might be ultimately adjudged against the defendant in the replevin proceedings. This is the effect of all the authorities, and infallibly leads to the doctrine, which is equally well settled, that in an action on a replevin or redelivery bond, the judgment in the replevin suit is conclusive upon the sureties on the bond. The sureties being identified in interest with the principal, are regarded as having been represented by him in the course of the replevin case, and they, having contracted with reference to the judgment therein, are held, in the absence of fraud, to be concluded by all proceedings had, down to and including such judgment. Thus, it is said:

> "The surety on a bond given in the course of legal proceedings submits himself to the acts of the principal, and to the judgment, as itself a legal consequence, falling within the suretyship, and therefore is conclusively bound by a judgment against the principal, to the exclusion of all defenses which were or might have been set up by the latter."
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> 23 Cyclopædia of Law and Procedure, 1278.

In an action by a surety on a guardian's bond, against his co-surety for contribution, the plaintiff having paid the judgment rendered against the guardian and himself, the defendant offered to prove that the judgment was obtained as a part of a collusive arrangement between the judgment creditor and the guardian to defraud the ward. The defense was rejected, the court saying:

> "The general rule, of course, is that a judgment is conclusive only as against parties and privies; but to this there are exceptions. And it is conceded that

> whenever the surety has contracted in reference to the conduct of one of the parties in some suit or proceeding in the courts, he is concluded by the judgment."
>
> Shepard *vs.* Pebbles, 38 Wisconsin, 373, 378.

See, also,

> Cobbey on Replevin, section 1331.

In Bradford *vs.* Frederick, 101 Penna. St., 445, a suit against the sureties on a redelivery bond given in an action of replevin, the sureties sought to be relieved from liability on the ground that judgment was confessed, without their knowledge, by the defendant in the replevin suit. The court held this to be no defense, saying:

> "There is no difference in legal effect between a judgment confessed and a judgment on the verdict of a jury. * * * It was said by our brother, Sterrett, in Jamieson *vs.* Capron, 14 Norris, at page 20, 'The plaintiff in error, in becoming surety for the defendants in the action of replevin, must be considered as having contracted with reference to the law applicable to the trial and final determination of the cases, and with the view of becoming responsible for the amount that might ultimately be adjudged against the defendants.' This language is applicable here. The confession of a judgment by the defendant is a recognized and orderly mode of ending a pending suit."

It will be remembered that in Jamieson *vs.* Capron, 95 Penna. St., 15, above cited, the decision of the court turned upon the fact that "the plaintiff in error, in becoming surety for the defendants in the action of replevin, must be considered as having contracted with reference to the law applicable to the trial and final determination of the cases, and with the view of becoming responsible for the amount that might ultimately be adjudged against the defendants."

To the same effect see Hocker *vs.* Wood's Exr., 33 Penna. St., 466; Tracy *vs.* Maloney, 105 Mass., 90; Cutter *vs.* Evans, 115 Mass., 27.

In Knight *vs.* Dorr, 19 Pick., 48, 51, the defense was that the bail was discharged by plaintiff's amendment in striking out the name of one of the original defendants; but the court ruled that as the amendment had no effect upon the plaintiff's recovery, it could not absolve the defendants from the obligations of their bail bond. Among other things, it is said in the opinion of the court:

> "When the defendants gave their bond they assumed the responsibility of bail, subject to various amendments of the plaintiff's writ and declaration in matters of form and to such modifications of the mode of proceeding as the legislature might think proper to make."

Smith *vs.* Mosby, 98 Indiana, 445, was an action against the sureties on a replevin bond.

On the trial of the replevin suit, the issues having been determined by the verdict of the jury in favor of the defendant in replevin, the court rendered an alternative judgment awarding the defendant the possession of the goods, and, in the event that they should not be returned, a judgment for their value.

The defendants tried to reopen the question of the value of the goods and have the same determined to be of less value than the amount fixed by the judgment in replevin.

The court said of this defense:

> "This answer admits the rendition of the judgment in the action of replevin as averred, and seeks to show that the matters involved in the issues were not in fact adjudicated. This cannot, as we think, be done. The judgment, as between the parties, is conclusive not only as to the ownership of the property, but as to its value. This has been repeatedly decided."

In Schott *vs.* Youree, 142 Illinois, 233, 243, concerning the contention of the defendant that he was discharged from liability as surety on the replevin bond by the action of the court in granting a change of venue in the replevin suit from the Circuit Court of Madison County to the Circuit Court of Jersey County, the court said:

> "The surety in the replevin bond (appellant here) contracted with reference to the action of his principals in prosecuting the replevin suit, and he is therefore concluded, as are his principals, by the judgments and orders made in that suit so far as the present question is concerned. Stevens *vs.* St. Louis & S. F. Ry. Co., 94 Mo., 317; Riddle *vs.* Baker, 13 Cal., 295. See also 12 Am. & Eng. Ency. of Law, p. 98, sec. 15, and cases cited in note 5; Gradle *vs.* Kern, 109 Ill., 557."

In Kennedy *vs.* Brown, 21 Kansas, 171, the condition of the band was "that the defendant, J. G. Kennedy, will * * * deliver the property in dispute in this action to the plaintiff, if such delivery is adjudged, and that he will pay all costs and damages that may be awarded against him." The court said:

> "Whenever the surety has contracted in reference to the conduct of his principal in a suit or proceeding in the courts, he is concluded by the judgment, in the absence of fraud or collusion between the prosecuting party and him whom they are bound for."

In Council *vs.* Averett, 90 North Carolina, 168, the condition of the bond was that plaintiff should prosecute his action and "return the property to the defendant, if such return be adjudged, and pay to him such sum as may for any cause be recovered against the plaintiff in this action." The court say:

> "The stipulation is twofold, and it is explicit to pay whatever sum for any cause may be adjudged,

> and the plaintiff assents to the recovery of what is accepted as the value of the goods. The plaintiff prosecutes his own action, and the sureties assume responsibility for whatever may be legitimately and *bona fide* adjudged against their principal, who alone is the manager of his action, and by whose conduct of it they must abide. His right to compromise in preference to hazarding the result of an inquiry into the value of the goods before a jury cannot be questioned."

So the condition of the bond in the case at bar was that the property should be delivered to said plaintiff if such delivery be adjudged, and payment to said plaintiff be well and truly made of such sum as may, for any cause, be recovered against the defendant.

In Mason *vs.* Richards, 12 Iowa, 74, it is said:

> "The proper judgment in an action of replevin, as a general rule, when the plaintiff fails to maintain his action, is for a return of the property to the defendant, both at common law and under the statute. * * * Suppose, however, no such order is made, but the court finds the value of the property and renders judgment therefor against the plaintiff, does such judgment, though irregular, have the effect of changing the liability of the surety in an action on the bond? Or, in other words, is it necessary, in order to make him liable upon his bond, for the breach now under consideration, that a judgment *de retorno habendo* should first be entered? We think not.
>
> "The district court could enter no judgment against the surety in the original suit, for he was not in court. The plaintiff, and principal in the bond, was in court, however, and over him the court had jurisdiction. For whatever judgment the court had the power to render against him, though ever so erroneous, he will be bound. And as a judgment erroneous merely would be binding upon him, so it would be upon his surety in an action on the bond."

In Richardson *vs.* Bank, 57 Ohio St., 229, 308, 315, which seems to have been decided upon a full consideration and review of the authorities, the surety appeared and defended on the merits, as well as against the summary mode of procedure authorized by an express statute, *i. e.*, on being summarily brought before the court to show cause why judgment should not be entered against him for breach of the condition of the replevin bond by the principal, he objected to being required to answer without a petition having been filed. In passing upon this objection the court said:

> "The law enters into and becomes a part of each undertaking of this kind; and the surety must be held to know that he may be called on in this summary mode to show cause why judgment should not be entered against him on a breach of the undertaking. * * * There was then no error in not requiring a petition to be filed. By signing the undertaking, he became a *quasi* party to the suit, and is held to have notice of all the proceedings thereafter in the suit that may affect his liability on the undertaking, particularly the judgment, which is *sub modo,* a judgment against him. * * * This is the extent of the proceeding. It was designed to give a speedy remedy against those who, by becoming surety on such undertakings, have assisted another in depriving a party of his property. The provision is neither harsh nor unjust, and should be liberally construed so as to afford the remedy intended in such cases. It is neither reasonable nor just that one who has been deprived of his property by a proceeding in replevin should be put to a long course of litigation in recovering compensation for what he has lost. This is the principle of justice that underlies the law. So that, whoever as surety signs a replevin bond, whether it be for the delivery of the property to the plaintiff, or for its redelivery by the defendant, assumes the obligation of making speedy restitution to the aggrieved party, as the judgment of the court may determine, if his principal does not."

* * * * * * *

> "We think it also clear that the surety on a replevin undertaking, cannot, in the absence of fraud or mistake, be heard to question the validity, or the amount of the judgment rendered against his principal in an action on the undertaking. When he signed the paper, he undertook to pay what might be so ascertained and adjudged against his principal. He cannot, therefore, be heard to say that the judgment is wrong. If there were any errors in the judgment, he should, through his principal, have caused them to be corrected in a proper proceeding. Not having done so, and the judgment being in force, and unreversed, he is bound by it to the same extent that his principal is."

To the same effect are Christiansen *vs.* Mendham, 61 New York St., 326.

Waldrop *vs.* Wolff, 114 Ga., 610, 620.

The case at bar is clearly distinguishable from an action on a replevin bond following a judgment of dismissal of the replevin suit for want of prosecution where there is no trial on the merits. In some of the States, such as Illinois and Indiana, there are statutory exceptions permitting the defendants to show the title or right of possession of the principal obligors in mitigation of damages. This distinction was pointed out in Smith *vs.* Mosby, 98 Indiana, 445, 448, where it was held that the judgment in the replevin suit was conclusive in a subsequent action against the sureties on the bond, both as to the ownership of the property and its value; the court saying:

> "The appellees refer us to a number of cases in our own reports where it has been held that in a suit upon a replevin bond the defendants may show, in mitigation of damages, that the principal obligors either were the owners or had a lien upon the property in question. In none of these cases, however, was any judgment rendered upon the issues formed, but all of them were dismissed without any adjudication. These cases are, therefore, not in point."

Moreover, such a case as that at bar has been distinguished, in Bridgeport Insurance Company *vs.* Wilson, 34 New York, 275, 280, from a case where the covenant is one of general indemnity, merely, against claims or suits, the court saying:

> "Again, covenants to indemnify against the consequences of a suit are of two classes. 1. Where the covenantor expressly makes his liability depend on the event of a litigation to which he is not a party, and stipulates to abide the result; and, 2. Where the covenant is one of general indemnity, merely, against claims or suits. To the latter class belongs the case now before us. In cases of the first class, the judgment is conclusive evidence against the indemnitor, although he was not a party, and had no notice, for its recovery is the event against which he covenanted. Patton *vs.* Caldwell, 1 Dall., 419."

In Irwin *vs.* Backus, 25 California, 214, which was an action on an administrator's bond, it was held that a decree of the probate court removing the administrator from office and appointing his successor and directing payment and delivery to the latter of a certain sum of money and a certain note belonging to the estate, was conclusive upon the sureties on the bond. The court, after reciting the conditions of the bond, saying, concerning the liability of the sureties:

> "They are bound to make good the default of their principal, and cannot go behind the decree to inquire into the merits. They may show in defense either that the bond was not made, or that the decree was not made; or, if made, that the same has been obeyed; or that the same was obtained by fraud or collusion; but they cannot show that the court has erred in making the decree or that no assets ever came into the possession of the administrator, although the court has so found and adjudged. If any error has been committed, the remedy is afforded by

> appeal. Until the order of decree is reversed, it is equally conclusive upon the administrator and his sureties."

In Braiden *vs.* Mercer, 44 Ohio St., 339, being an action on a guardian's bond, it was held that the sureties could not defend against the judgment of the probate court in finding the amount due the ward, as being for too large an amount, or because nothing was due the ward. The court said:

> "By their bond the sureties contract with reference to the action of a court and that the principal will obey its orders and conform to such action. Can they say they are strangers to such proceedings. Upon their principal's failure to obey the orders of the court there is clearly a breach of the bond. The relation they assume to such court and its action so far makes them privy to the proceedings affecting their principal as to deny to them the right, when called upon, to call in question the grounds upon which the court based its action, and to have the same cause retried. * * *
>
> "Indeed, it may well be considered an established principle that whenever a surety has contracted with reference to the conduct of one of the parties in some suit or proceeding in court, he is, in the absence of fraud and collusion, concluded by the judgment."

In Heard *vs.* Lodge, 20 Pick., 53, 58, it is said, concerning this defense to a suit on an administration bond:

> "To most purposes, it seems to us, that the sureties on an administration bond are, as well as the principal, estopped from controverting the validity of a judgment ascertaining the amount of the debt to be paid by the administrator. They are in many respects like the sureties in a bail bond, and equally bound by the proceeding against the principal. The duty they have assumed is that their principal will pay on demand all debts ascertained by judgment of a court of law against him in his capacity as ad-

> ministrator, if the estate be solvent. His failure to make payment is a breach of the administration bond. * * * We are satisfied, that as to all those matters of defense, going to the merits of the debt as between the original parties, the judgment against the administrator must be taken to be conclusive in a suit on the administration bond, where there has not been fraud or collusion."

In 2 Brandt on Suretyship and Guaranty (third ed.), section 563, the learned author comments on this subject as follows:

> "Judgment entered upon the finding of a jury in a replevin suit is held to be competent and conclusive evidence as against the sureties on the replevin bond. And during the pendency of a replevin suit, the sureties on the replevin bond are held concluded by a decree in which their principal acquiesces. Nor can they defend by showing that the judgment against their principal was erroneous. Nor can they object to the form of the proceeding against their principal. The principal alone is held to be responsible for the defense, and if he waive technical or substantial objection to the manner and form of the proceeding against him, the surety is bound by the result of the litigation on its merits. And it is held that they are concluded by the judgment, though it be not in strict accord with the statute. *So also, it is held that the sureties upon a redelivery bond are bound by the judgment in the replevin suit.*" (Italics ours.)

A verdict in claim and delivery, finding the title to the property in the plaintiff and assessing its value, was held to be conclusive against the sureties of the defendant in replevin in the recent case of Parish *vs.* Smith, 66 South Carolina, 424, in which the language of the condition of the redelivery bond is essentially the same as in the case at bar.

In commenting upon the contract of suretyship the court said:

"By the terms of the undertaking the defendants not only become liable for the return of the property to the plaintiff, if the delivery thereof should be adjudged, but likewise for the payment to him of such sum as might in that action for any cause be recovered against the defendant. * * * It is clear that this is one of the class of cases referred to in Smith *vs.* Moore, 7 S. C., 209, where the recovery of the judgment is in itself the happening of the contingency in which the surety was to become bound, and consequently conclusive proof not only of a breach of the bond, but of the quantity of damage resulting therefrom. It is contended that the waiver of the plaintiff in the action in which the bond was given of claim to the delivery of the property specifically discharged the sureties on the bond. To make good this proposition it would be necessary to establish that the sureties can question the regularity of the judgment recovered in the principal action. On general principles this cannot be done; but in the present case, the insertion of the words *'for any cause' clearly was intended to exclude the surety from alleging that the judgment was rendered for some special cause beyond the contemplation of the undertaking.* (Italics ours.) These authorities conclusively show that the sureties were liable to the full extent of the verdict properly rendered under the pleadings in the action against R. J. Smith."

In the recent case of Waldrop *vs.* Wolff, 114 Ga., 610, 620, it is said by the court: "After becoming securities on the bond they must remain silent witnesses to the conflict between the parties to the suit, standing ready to fulfill at the end of the litigation the obligation they have undertaken."

The rule is the same in this court.

Thus, in Stovall *vs.* Banks, 10 Wallace, 583, it was contended in behalf of the defendants, sureties on an administration bond, that the judgment of the superior court of Morgan County, Georgia, fixing the amount of the assets

of the decedent's estate in the hands of the administrator and ordering the distribution of the whole in certain sums to the distributees, was not a final and conclusive adjudication as against the administrator's sureties, but, as against them, merely *prima facie* evidence.

In denying the correctness of this contention, it was said by Mr. Justice Strong, speaking for the court:

> "It has been argued on behalf of the defendants in error that the decree of the superior court, if admitted, would have been only *prima facie* evidence against the sureties in the bond. Were that conceded, it would not justify the exclusion of the evidence. But the concession cannot be made. The decree settled that the administrator of the intestate, Alfred Eubanks, held in his hands sums of money belonging to the equitable plaintiffs in this suit, as distributees of the intestate's estate, which he had been ordered to pay over by a court of competent jurisdiction, and the record established his failure to obey the order. Thereby a breach of his administration bond was conclusively shown. Certainly the administrator was concluded. And the sureties in the bond are bound to the full extent to which their principal is bound. * * *
>
> "Much of the argument upon both sides of this case has been devoted to the consideration of the inquiry whether the Superior Court of Morgan County and the Supreme Court of Georgia rightly adjudged that the equitable plaintiffs are entitled to a share of the estate of the decedent in the administrator's intestate. That is no longer an open question. It was concluded by the decree offered in evidence. It cannot be tried again in this case."

Unlike the statutes of certain States (see Richardson *vs.* Bank, 57 Ohio St., 299), the laws of Hawaii fail to provide for the entry of judgment against the obligors on a redelivery bond for breach of condition by *scire facias* or other summary process and without a trial by jury. If such a statute had existed in Hawaii, the entry of a summary judg-

ment under it against these defendants for a breach of the condition of the bond in question would have been wholly just and correct, according to the ruling of this court in Hiriart *vs.* Ballon, 9 Peters, 156. This was a writ of error to the District Court of the Eastern District of Louisiana to review a summary judgment entered against the plaintiff in error upon an appeal bond in pursuance of a rule of the district court. The principle relied on was that the party was entitled to a trial by jury and that no such summary judgment was authorized by law. Mr. Justice Story, speaking for the court, said:

> "The laws of Louisiana allow appeals from the district courts of the State to the Supreme Court upon giving an appeal bond with security; and authorize a summary judgment upon such appeal bond, upon mere motion in the court from whence the appeal was taken in execution of the judgment of the appellate court. The rule of the District Court of Louisiana, therefore, follows the analogy of the laws of Louisiana, being modified only so far as is proper to suit the organization of the courts of the United States and to conform to the laws thereof. The summary judgment, therefore, was strictly authorized; and the party appellant had no right to a trial by jury. *In becoming a surety he submitted himself to be governed by the fixed rules which regulate the practice of the court* (italics ours). The judgment is affirmed, with damages at the rate of six per cent, and costs."

The case of Washington Ice Company *vs.* Webster, 125 U. S., 426, is directly in point. After levying upon property, under a writ of replevin, the sheriff delivered the property over to the plaintiff. Upon the trial, judgment went in favor of the defendant, and the jury assessed the value of the ice replevied at $20,069.33. In ruling that the finding of the jury on the question of the value of the property replevied was conclusive against the sureties in a subsequent

action against them on the replevin bond, the court said (p. 444):

> "It is also contended for the defendants in this suit that the Circuit Court erred in rejecting the evidence offered by them to show that the value of the ice replevied was less than $10,000, at whatever time such value was to be assessed, and in ruling that the plaintiff was not precluded from showing that the value of the goods replevied was more than the $15,000 named in the replevin writ and the bond.
>
> "We do not think the court erred in rejecting the evidence so offered by the defendants. The writ of replevin stated that the quantity of ice was 'about thirty-eight hundred tons,' 'of the value of fifteen thousand dollars.' The bond of the 12th of August, 1870, recited that the action was for 'about thirty-eight hundred tons of ice,' 'of the value of fifteen thousand dollars.' The first return of the sheriff, dated August 13, 1870, specified the quantity of ice as 'about twenty-five hundred tons.' The amended return specified the quantity as being 2331 tons and 1851 pounds. The jury, in the trial of the replevin suit, found that the value of the ice replevied, where it was situated, at the time it was taken, was $20,069.33. The condition of the bond must be held to mean, that the quantity of goods replevied was to be restored, leaving it to be ascertained what that quantity was. It must be assumed, in the absence of evidence to the contrary, that the quantity named by the jury as the basis of the value they found, was the quantity named in the amended return of the sheriff. The sureties in the bond were, by its terms, so connected with the replevin suit, that they are bound by the adjudications necessarily made in it. The jury could not have found any basis for the calculation of the interest as damages, unless they had found, as they did, the value of the ice, where it was situated, at the time it was taken. The sureties are bound by that finding. * * *
>
> "Such value was found by the jury, in finding the verdict, and a judgment having been entered thereon, the fact so found is conclusive, not only upon the

> parties to the replevin suit, but upon those who became sureties by the bond, to abide its event. The sureties became bound by the result of the replevin suit by virtue of their agreement contained in the bond. * * *
>
> "The sureties in the replevin bond were represented in the replevin suit by the plaintiff therein, and were identified with it in interest, and claimed in privity with it, so as to be concluded by the proceedings in that suit. 1 Greenl. Ev., sec. 523."

The sentence last quoted, paraphrased merely so far as to apply to the slightly different state of facts, viz., the sureties in the redelivery bond were represented in the replevin suit by the defendant therein, and were identified with him in interest, and claimed in privity with him, so as to be concluded by the proceedings in that suit, we submit with deference declares the very law of the case now before the Court.

An examination of the text writers and of reported cases would seem to demonstrate beyond doubt or question the truth of the conclusion expressed by Wilder, J., in his dissenting opinion, viz., that the conclusions of the majority judges that the risk assumed by the sureties in this case was "to be responsible for the return of property, of a specified value, or in default thereof for the payment of a judgment for its (such) value, together with damages, interest, and costs," and that the subsequent amendments of the *ad damnum* clause of the declaration in replevin "increased the risk of the sureties" * * * outside of or beyond their contract and thereby caused their discharge from all or any liability on the redelivery bond, is "contrary to both principle and the great weight of the decided cases." If we are correct in this, as we believe and submit we are, it would seem to follow that the judgment of the Supreme Court of the Territory, here under review, should be reversed and the cause remanded for further proceedings, unless it should be made in some proper manner to appear to this

court that notwithstanding the absence of any cross-writ or cross-assignment of errors on the part of defendants in error, "the remaining grounds of the motion (defendant's motion for judgment *non obstante veredicto*) and the remaining exceptions not necessarily involved" (R., 121) therein, are open for argument here. With respect to such of the exceptions contained in defendant's elaborate bill of exceptions (R., p. 183-743) from the Circuit Court on the refusal of that court to enter judgment *non obstante veredicto*, as are not preserved in plaintiff's bill of exceptions on writ of error from this court,—for reasons stated in authorities above cited it is submitted that none of such exceptions are open for argument here. With respect to "the remaining grounds of the motion" for judgment *non obstante* which were not specifically passed upon or denied by the Supreme Court the result may be otherwise, though on principle it seemingly should not.

In our view the refusal or failure of the Territorial Supreme Court to pass upon such "remaining grounds" was equivalent to the denial or rejection thereof by that court, and in the absence of exception to such denial or rejection by the party aggrieved, should stand as the final disposition thereof, not open to review by this court.

But as it may be thought otherwise by some, we will briefly make reply to such of said "remaining grounds" as seem still to be relied upon by defendants in error.

With respect to the suggestion that sureties upon a redelivery bond conditioned for the delivery to the plaintiff in replevin of "certain property specifically set forth in the Bill of Complaint filed in said suit, and of the value of $15,000 as stated in the affidavit filed therein" (R., 20) "if such delivery be adjudged," and for payment to said plaintiff "of such sum as may, for any cause be recovered against the defendant" (R., 21), may be discharged by the subsequent enactment of local or Federal legislation over which

the plaintiff had no control and which did not in any wise purport to affect the contract of the obligors in said bond, but merely the method of enforcing it; it would seem to be sufficient to say that parties to contracts have no vested right to insist that legislatures, during the pendency of said contract or the continuance of rights and liabilities thereunder shall refrain from adding to or taking from statutory remedies theretofore provided for the enforcement of or defence against such rights and liabilities, provided always that adequate remedy for such enforcement or the making of defence thereto, shall remain.

As said by this court in Brown *vs.* New Jersey (175 U. S., 172):

> "The State has full control over the procedure in its court, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with the specific and applicable provisions of the Federal Constitution."

And in Bronson *vs.* Kinzie, 1 Howard, 311, it was said:

> "If the laws of the State passed afterwards had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection. For undoubtedly, a State may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. * * * Although a new remedy be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may

be altered according to the will of the State, provided the alteration does not impair the obligation of the contract."

Any suggestion that the suit on the return bond was brought against the executors prematurely would seem to be sufficiently answered by the counter-suggestion that that matter is solely one of local practice and procedure which the Supreme Court of the Territory, in so far as this case is concerned, appears to have approved. Again, on the authority of cases cited above, such matters of local practice and procedure in Territorial courts are not open for review here.

A further answer might be made referring to the provisions of sections 1853 and 1854, Revised Laws of Hawaii, respecting suits against executors and administrators, and sections 71 and 75 of the Territorial act of April 22, 1903 (Session Laws of Hawaii, 1903, 207, 209), Revised Laws of 1905, sections 1861-1865, providing for the entry of judgment and issuance of execution pending exceptions upon good cause shown, etc.

Henry Waterhouse, the only solvent obligor on the redelivery bond, having died at Honolulu on or about February 20, 1904 (Rec., 77), notice to creditors of said deceased was given by William Waterhouse and Albert Waterhouse, executors of the last will and testament of said deceased, by publication thereof on April 5, 12, 19, and 26, and May 3, 1904, in the Evening Bulletin, a newspaper published daily at Honolulu, to present their claims to said executors, duly authenticated, with the proper vouchers, within six months after the first publication thereof (Rec., 84, 85).

At that time the Hawaiian statute of limitations required a claim against the estate of a deceased person to be presented to his executors within six months from the date of the first publication of notice to creditors, or be forever

barred, and further provided, as to a claim rejected by the executors, that suit must be brought thereon within two months after notice of rejection, or it would be forever barred, the provisions of the statutes applicable to this subject being as follows:

> "Immediately after the appointment of any executor or administrator of any estate, he shall advertise in such newspaper or newspapers as the court shall direct, for as long a time as the court may order, at least once a week for four weeks, a notice to all creditors of the deceased to present their claims, duly authenticated and with the proper vouchers, if any exist, even if the claim is secured by mortgage upon real estate, to him, either at his residence or place of business, within six months from the day of such publication. And if such claims be not presented within six months from the first publication of the notice, or within six months from the day they fall due, they shall be forever barred, and the executor or administrator shall not be authorized to pay them.
>
> "If any claim be rejected by the executor or administrator, he shall give written notice of such rejection to the creditor, and suit must be brought upon it against the executor or administrator within two months after such notice is given, or within two months after the same becomes due, or it will be forever barred."
>
> Sess. Laws Hawaii (1898), c. 37, §§ 1, 2.
> Rev. Laws (1905), §§ 1851, 1853.

Having failed to enforce its judgment by execution, upon the return of the same unsatisfied by the sheriff on May 27, 1904, plaintiff was confronted with the alternative of losing all benefit of its judgment by reason of this short limitation act, or of proceeding at once against the estate of Henry Waterhouse, deceased, for the amount of its judgment, regardless of the consequences of the appeal to the Territorial Supreme Court upon bill of exceptions by the defendant in the replevin suit, which could not be heard

until after the lapse of the six months' period of limitation, and was not, in fact, argued until November 14, 1904 (Bierce *vs.* Hutchins, 16 Haw., 418). As the executors of the deceased surety first published notice to creditors to present their claims on April 5, 1904, the bar of the statute would have become complete with the expiration of October 5, 1904, if plaintiff meanwhile had failed to present its claim, provided the claim fell due so that the statute began to run on or prior to April 5, 1904.

The authorities are agreed that the statute of limitations commences to run as against a right of action for breach of the condition of a replevin or delivery bond from the date of the judgment for a return of the property, which in this case was March 19, 1904 (Rec., 34). Cobbey on Replevin (2d ed.), secs. 1299, 1311, 1313, 1314, *et seq.;* Hagan *vs.* Lucas, 10 Peters, 40; Lovejoy *vs.* Bright, 8 Blackf., 206; Evans *vs.* King, 7 Mo., 411; Lockwood *vs.* Perry, 9 Met., 444; Burkle *vs.* Luce, 1 Comstock (N. Y.), 163; McRea *vs.* McLean, 3 Port. (Ala.), 138; Delay *vs.* Yost, 59 Kan., 496.

No order of court was entered in the replevin suit staying execution on the judgment, but the perfecting of an appeal in any case from a judgment of a circuit judge, by virtue of sections 71 and 75 of the act of April 22, 1903, above quoted, is regarded as operating as an arrest of judgment and stay of execution, subject to the power of the court, upon good cause shown, to allow execution to issue pending the appeal, unless the appellant shall, within such time as shall be allowed by the judge, deposit a supersedeas bond in such amount and with such sureties as shall be approved by the judge, etc.

Obviously, if plaintiff might enforce its judgment by execution, as it was given the right to do by the orders of the court, and if defendant failed to return the property or to

pay the money, the conditions of the bond had been broken and plaintiff's cause of action thereon had accrued.

These proceedings for the enforcement of the judgment in replevin by execution were had in pursuance of the provisions of sections 71 and 75 of the act of the Territorial Legislature, entitled, "Act 32. An act to amend chapter LVII of the Laws of 1892, entitled 'An act to reorganize the Judiciary Department,'" etc., approved April 22, 1903.

Sess. Laws Hawaii (1903), 207, 209.

Rev. Laws (1905), secs. 1861, 1865.

Section 71 provides in substance that "An appeal duly taken and perfected in any case from a judgment * * * of a circuit judge * * * shall operate as an arrest of judgment and stay of execution; provided, however, that the judge * * * may, upon good cause shown, allow execution to issue * * * pending such appeal, unless the appellant shall, within such time as shall be allowed by the judge, * * * deposit a bond in such amount and with such sureties as shall be approved by the judge * * * (the amount to be not less than double the amount of the judgment * * *) conditioned for the prosecution of the appeal without delay, and for the payment or other performance, as the case may be, of the judgment, order, or decree, or part thereof that may be rendered or affirmed in the Appellate Court." * * *

Section 75 provides in like manner with reference to a case to be reviewed upon exceptions, that "Upon the allowance of such bill of exceptions and the deposit of twenty-five dollars, or a bond of the same amount, by the party excepting, with the clerk of such court, for costs to accrue in the Supreme Court, the questions arising thereon shall be considered by the Supreme Court; but judgment may be entered and may be enforced or arrested pending such exceptions, as provided in section 71 in the case of an appeal, *mutatis mutandis.*"

More than six calendar months had expired since the will of Henry Waterhouse had been probated before this suit against his executors was filed. Under the statutes of Hawaii, Revised Laws, sec. 1854, the claim was justiciable irrespective of whether it had been rejected by them.

Again this also involves a matter of purely local practice and procedure, which is not reviewable in this court.

The matters specified in grounds numbered *1, 3, 4,* and *14* of the "Motion for judgment *non obstante veredicto*" are not matters of substance on this writ of error and with the possible exception of ground numbered *3* do not appear to have been seriously urged by the moving party at any time. Ground numbered *3* undertook to present in different form the same question presented in ground numbered *5,* and the objections above suggested to the latter ground equally apply to the former.

The matters specified in grounds *9, 10, 11, 12* and *13* (Rec., 107) all relate to matters of fact, depending for settlement upon conflicting evidence—all of which matters were submitted to the jury under the proper instructions of the trial court and each of which was foreclosed by the verdict of the jury.

Upon the whole case as presented by so much of the transcript of the record as may properly be examined and considered on this writ of error, it is respectfully submitted that the judgment of the Supreme Court of the Territory of Hawaii entered herein on the 23d day of November, 1909, should be reversed and the cause remanded to that court with an instruction to reverse the judgment of the circuit court of the first judicial circuit of Hawaii entered *non obstante veredicto* in this cause on the 29th day of May, A. D. 1909, and to remand the case to that court with an instruction to reinstate of record its judgment of May 29, 1909.

entered on the verdict of the jury in favor of the plaintiff, William W. Bierce, Limited, and against the defendants in error, William and Albert Waterhouse, executors, &c., of Henry Waterhouse, deceased.

Notwithstanding the final judgment and mandate of this Court entered and issued pursuant to the opinion of the Court reported in 205 U. S., 340, the lower court refused to enter a final judgment affirming the judgment of the trial court in the replevin suit in favor of William W. Bierce, Limited, saying:

> "This case came before this court upon a bill of exceptions of the defendant comprising 46 exceptions, most of which were argued and relied upon. These presented questions relating to the right to amend, to the admission of evidence, and to the form of the judgment as well as the questions of election, waiver and conditional sale. This court, however, in sustaining those exceptions involving the question of election, found it unnecessary to pass upon the other points. Upon the petition for rehearing the court stated that for the purposes of the original decision it was assumed that the contract was one of conditional sale, or an executory contract to sell upon a condition precedent.
>
> "The Supreme Court of the United States passed upon two points, namely, whether the acts done by the plaintiff constituted an election as a matter of law, and whether the sale was on the condition precedent. The opinion concludes: 'Some other subordinate suggestions were made, but we have disposed of the only questions that are open here.'" (Bierce *vs.* Hutchins, 205 U. S., 340 and 349.) "The mandate reverses the decree of this court with costs and concludes: 'And it is further ordered that this case be and the same is hereby remanded to the said Supreme Court for further proceedings in conformity with the opinion of this court.'
>
> "No question was made of the right of the plaintiff to a judgment for costs in conformity with the man-

date, but we are of opinion that the plaintiff is not entitled at this stage of the proceedings to an overruling of all of the defendants' exceptions and an affirmance of the judgment. The points decided by the Supreme Court of the United States are, of course, concluded, but the defendant brought other exceptions before this court which were not passed upon owing to the conclusive character of the point erroneously decided in his favor. In obeying a mandate from the Supreme Court we are at liberty to look at the opinion of that court and to consider and decide any question left open by the mandate and opinion.

Ex parte The Union Steamboat Co., 178 U. S., 317, 319.

"The defendant should be allowed to present any questions raised by his bill of exceptions not covered by the opinion of the Supreme Court of the United States, and the plaintiff's motion, except in so far as it asks judgment for costs, is denied." 18 Haw 374, 375

To revise this action an application was made to this court by William W. Bierce, Limited, for leave to file a petition for mandamus and an order to show cause was issued thereon December 23, 1907. The fate of this order to show cause is uncertain. No return was ever made upon it and the reserved exceptions were finally overruled by the Supreme Court of the Territory and the cause proceeded to a final judgment in favor of the plaintiff in the circuit court.

It must be observed that if the position taken by the Supreme Court of the Territory with respect to its right to render a final judgment subject to review in this court by writ of error or appeal, and at the same time to reserve or hold back certain questions of law unpassed upon, is a tenable position, then it would seem to be practically impossible ever to put an end to this particular piece of litigation.

In the replevin suit the defendant Hutchins, Trustee, had only taken the precaution to note of record 46 points of ex-

ception, of which the Supreme Court of the Territory only passed upon two when rendering its final judgment, which was subsequently reversed by this court, whereas in the course of the suit now before this Court on the return bond, the defendants, sureties on the bond, having learned wisdom from the experience of their principal in the former suit, have forehandedly reserved of record in excess of 130 exceptions, with some 14 additional or correlated grounds of motion for judgment. Of these the Supreme Court in the majority opinion, passing upon a single point or ground specified in the motion for judgment, and observed that "the remaining grounds of the motion and the remaining exceptions not necessarily involved are not passed upon." (Rec., 121.) Notwithstanding which, it entered judgment against plaintiff in error here in every essential of form and substance, final and conclusive, as to his rights in the premises.

If, judging from the opinion and course of action of the Supreme Court of the Territory in the replevin case, the above indicated re-ervations with respect to "grounds of motion" and "remaining exceptions not necessarily involved" was made for the purpose of taking further proceedings in connection with said grounds and exceptions in the event of a reversal by this court of said final judgment, it would seem that notwithstanding the well-established rule on the subject, this court may be compelled either to review cases from the Supreme Court of the Territory of Hawaii "piecemeal" (Cotton *vs.* Hawaii, 211 U. S., 162 and 170, bottom), or else litigants therein may be effectually deprived of a statutory right to secure a final judgment of their differences by this court. As the judgment of the Supreme Court in the present case is final, both in form and substance, the reservation made in the opinion of the court would seem to be of but little consequence, for every question of law raised in the lower court and presented by the record before this court is open for the consideration of this court, and its

judgment in the premises should be accepted as final and conclusive of the entire matter.

Tyler *vs.* Magwire, 17 Wallace, 263, 283.
Stewart *vs.* Salamon, 97 U. S., 361.
Illinois *vs.* Illinois Central R. Co., 184 U. S., 71, 91.

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FREDERIC D. McKENNEY,
Attorneys for Plaintiff in Error.

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APPENDIX.

CASES CITED.

Supreme Court of the United States.

OCTOBER TERM, 1910

No. 508

WILLIAM W. BIERCE, LIMITED,
Plaintiff in Error,

vs.

WILLIAM WATERHOUSE AND ALBERT WATERHOUSE, EXECUTORS UNDER THE WILL AND OF THE ESTATE OF HENRY WATERHOUSE, DECEASED,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

This action was brought October 12th, 1904, against defendants in error as executors of the will of Henry Waterhouse, deceased, Arthur B. Wood and Clinton J. Hutchins, Trustee, the latter the principal, with Waterhouse and Wood as sureties, on a bond in the penal sum of $30,000 dated the 21st day of July, 1903, given in a replevin action brought by the plaintiffs in error in the Circuit Court of the

Third Circuit of the Territory of Hawaii on the 20th day of July for the recovery from said Hutchins of certain rails, rolling-stock and other railway material used in connection with the sugar plantation of the Kona Sugar Company, on the Island of Hawaii, the property being alleged in the original complaint (Tr. p. 9), in the affidavit (Tr. p. 17), and in the return bond sued on (Tr. p. 20) as "of the actual value of $15,000," and in the original complaint in this action (Tr. p. 688) as "certain property specifically set forth in the complaint filed in said action, of the alleged value of Fifteen thousand dollars."

The case was transferred from the Third Circuit to the First Circuit on December 14, 1903, by a stipulation between the attorneys of the plaintiff and defendant Hutchins (Tr. p. 205).

Upon the trial, the allegation of the actual value of the property was amended to $20,000 (Tr. p. 13); and the complaint was also amended by counting on a contract of March 13, 1901, instead of a prior contract of February 2, 1900, supplemented by the contract of March 1, 1901 (Tr. pp. 10, 11). The Court, sitting without a jury, having on the 12th day of March, 1904, found the value to be $22,000 (Tr. p. 233), the complaint was again amended in accordance on March 19, 1904 (Tr. p. 13), when judgment was rendered for the return of the property or the payment of $22,000, its value, damages in the sum of $1045, and costs amounting to $50.50 (Tr. pp. 34-36).

A motion for a new trial was made March 19, 1904 (Tr. p. 207). On March 28, 1904, on motion of the plaintiff, the defendant was ordered to file a new redelivery bond, with two sureties, on or before the 2nd day of April, 1904, which time was extended subsequently to the 6th day of April, 1904 (Tr. pp. 220, 221); and on the 8th day of April, 1904, the Court ordered that execution issue, unless before the 15th day of April, 1904, a bond in not less than double the amount of judgment, with sureties, conditioned for the prosecution of the exceptions and for the performance and payment of the judgment which might be rendered by the Supreme Court, be filed (Tr. pp. 225, 226). No bond having been filed, on the 15th day of April, 1904, an execution was issued ordering the sheriff to take possession of the property and deliver the same to the plaintiff, and, in event that he could not secure possession of the property, to levy upon the personal or real property of the defendant to realize said sums.

Henry Waterhouse died in Honolulu on February 20, 1904. By his will he appointed the defendants William Waterhouse and Albert Waterhouse executors, who upon probate of the will qualified as such and gave notice to creditors for the presentation of claims within six months after the first publication, which was on April 5, 1904 (Tr. p. 238).

On the 6th day of September, 1904, the plaintiff presented a claim to Albert Waterhouse, in which claim the return bond was dated the 21st day of July, 1904, and the copy was further not authenti-

cated. This claim was rejected and returned to the Bierce Company September 26, 1904.

A new claim, corrected in these particulars, was presented September 30, 1904, to Albert Waterhouse, one of the executors, accompanied by a letter (Tr. p. 159) stating that it was put in in place of the former one because of these defects, and asking for prompt action. Albert Waterhouse consulted his attorneys and his co-excutor, William Waterhouse, who was then in Pasadena, in the State of California, but before any action had been taken by the executors on the claim this suit was brought October 12, 1904 (Tr. p. 337).

In the meantime the plaintiff, through its attorneys in fact and at law, had given options for the purchase of the property in suit, amongst others, to Alexander & Baldwin, Limited (Tr. p. 484), and on the 14th day of April, 1904, had given to the Kapiolani Estate, Limited, which was making some claim adverse to Hutchins, the Kona Sugar Company and to Bierce, an option for $20,000 "for 30 days from the date when the Kapiolani Estate, Limited, shall be notified in writing that the option heretofore given by William W. Bierce, Limited, to Alexander & Baldwin, Limited, of Honolulu, is not to be taken up." The option was further dependent on the Bierce Company's obtaining permission for the property to remain on the lands where it was during the life of the option, unless the Kapiolani Estate should choose to bear the expense of removal (Tr. p. 160).

On the 15th of April an execution was issued and delivered to the plaintiff's attorneys (Tr. p. 328), but was not delivered to the sheriff until the 23rd day of May, 1904 (Tr. pp. 469, 470), having been in the hands of the plaintiff's attorneys from the 15th of April.

On April 18th plaintiff's attorneys demanded the delivery of the property in suit "at any convenient and appropriate place that you may name," reciting that a large part of the property was claimed by others and that no questionable delivery would be taken, giving to April 19th for a reply; also making a demand for the damages. On the same day Hutchins delivered these attorneys an instrument purporting to return all the property "in the same condition as and in the exact situs where the same was when I purchased it at the receiver's sale" and "in the same condition as and in the exact situs where the same was received by me from the High Sheriff," reciting that the return and delivery was made in pursuance of the order of the writ, without prejudice to the right to pursue the bill of exceptions, at the same time paying the damages (Tr. pp. 151-153).

On the 19th of April notice was given that the Alexander & Baldwin option had not been taken up and that the time limit would begin to run (Tr. p. 161).

On April 21st the plaintiff's attorneys replied that the purported redelivery "is satisfactory and acceptable only in the event of our being able under it

to take actual possession," refer to certain alleged claims, and conclude: "We will at once notify you in the event we are unable to secure actual possession of the property. We also take it for granted that from your standpoint, a redelivery having been made, you will not use or attempt to use any of the property in question" (Tr. pp. 153, 154).

The property remained on the ground in the possession of the Kapiolani Estate, and the option expired by limitation, "nothing further being done" (Tr. p 488). Neither Hutchins nor anyone claiming under him interfered with the property in any way (Tr. p. 386). The only claim of interference is that Hutchins made a deed to F. B. McStocker November 7, 1905, at a time when the Supreme Court of Hawaii had declared that Hutchins was the owner of the property and that Bierce had no interest and there was no appeal pending, the deed not referring specifically to the property, but conveying personal property conveyed to Hutchins by Dortch, "and not heretofore assigned by me" (Tr. p. 298).

Hutchins was notified of this option April 26, 1904, by a letter from the attorneys of the plaintiff, written "without prejudice to our claim now made or which may hereafter be made that you have not made a redelivery," in the event of receiving an actual redelivery to "sell the same to you at any time within 30 days from this date for the sum of $19,000 Gold Coin, you to take the delivery of said property from us as it now lies." "This option of course is subject to the one previously given to the Kapiolani

Estate, Ltd" (Tr. p. 141). Nothing further was done until May 16, 1904, when the attorneys wrote Hutchins, stating that, "because of the illness of the writer of this letter, he having had sole charge of the W. W. Bierce, Limited, litigation, the matter of redelivery to us of the railroad material sued for has not received appropriate attention" (Tr. p. 154). The letter states that the property had been tendered and accepted, "conditioned upon its being an actual delivery," and that one Scott, interested with Hutchins, had made a statement that rails had been laid in part on lands without the permission of the owners, in some cases during the night time, and that any attempt to remove these rails would lead to trouble and litigation, asking for an explanation, and also asking for inspection of various leases "under which you claim the right to enter upon these lands and maintain there the railroad." The evidence in the case shows that Scott did not make any such statement, that the rails were not laid without the permission of the owners or during the night time, and there was no evidence that there would be any litigation over their removal (Tr. p. 387).

Hutchins' attorneys, on the 26th of May, write that a surrender had been made of all the property in response to demand, that since then it has been in the possession of Bierce and not of Hutchins, and that Hutchins is not responsible for Scott's statement, but that Scott denies having made any such statement, and stating that they do not see that any

good end can be subserved by submitting the leases (Tr. p. 155). Scott's letter, enclosed, makes a sweeping denial.

To this, on May 27th, the plaintiff's attorneys replied that they were now prepared to state that the purported delivery was not acceptable; that one of the members of the firm, Mr. Cooper, had been to Kailua to take possession of the property; "the land owners absolutely refused to allow us to remove the rails in question, and we then placed the execution in the hands of Mr. Nahale for the purpose of having the same satisfied. Mr. Nahale was also unable to take the property, and the said execution has this day been returned into the court as unsatisfied." and claiming that Scott's letter only raised a question of veracity (Tr. p. 156).

To this, Hutchins' attorneys replied, doubting the "good faith in the so-called attempt to take possession of the property in question," and reiterating again that the property had been turned over under the execution precisely as received (Tr. pp. 157, 158).

No land owners refused to allow the rails or other property to be removed. Two alone can be referred to: Paris, whose notice is found (Tr. pp. 638, 639), and who was not permitted by the court to testify that the rails on his land were not claimed by the Bierce Company. The testimony in this suit and that introduced in the replevin suit showed that none of the Bierce property was on the Paris land. These were different rails entirely (Tr. p. 440). Or

the Kapiolani Estate, which held an option for the property, and was in possession of the land which seems to have been in litigation between Hutchins and it, holding under a writ of possession, to review which a writ of certiorari had been brought in the Supreme Court (Tr. p. 474)—illegally in possession, as appears from *In Re Hutchins, Trustee,* 15 Haw. 624, 672. The plaintiff's attorneys were the attorneys for the Kapiolani Estate, and the testimony of Colburn, Scott, and Conant—three of the four persons present—is clear: that Colburn, representing the Kapiolani Estate, stated that it made no claim to the property and that Judge Cooper or the sheriff could take it, but that they could not take it out over the rails, which had been taken up by him at the boundary fences; that Judge Cooper and the sheriff were admitted to the ground by Colburn, whereas Scott was not permitted to go upon the premises, although offering to assist. The testimony of Colburn (Tr. pp. 504-508), of Conant (Tr. pp. 415-417), and of Scott (Tr. pp. 378, et seq.) shows that the property was then available, in the same condition as when originally replevied .

The remaining witness, Judge Cooper, when first called, says that Scott called attention to physical difficulties and "said that he would see that I did not get the rails" (Tr. p. 463). This, however, was in answer to a statement that he (Cooper) would go to the end of the track and take up the rails at that end and bring them in, which rails, as the evidence showed, were on the Paris land and claimed by him

and by the Kona Sugar Company, to which Bierce made no claim. He cannot give his conversation with Colburn, but says the result of his conversation was that he would not deliver the property. On cross-examination, however, he stated that his firm was acting as attorneys for the Kapiolani Estate in the writ of possession; that it was claiming to hold possession of this very property (Tr. p. 474); that the principal conversation was in regard to taking up some rails (Tr. p. 477) which were lying alongside the track (Tr. p. 480); that his firm was in negotiation with the Kapiolani Estate for a sale of the property outside the option (Tr. p. 486); that Colburn did make some remark of this kind to him: "You might try to roll the engine," or, "Well, you might try and roll the stock off, engines off and cars off." (Tr. p. 488). The witness voluntarily returned on the next day and made the following statement: That he had thought the matter over and believed he did say to Scott, when the property was tendered, that he "would not accept the property under those conditions." "I remember the incident now that I did refuse to accept the property as apparently tendered" (Tr. pp. 491, 492). That there had been a change of policy on the part of his clients (Tr. p. 493). Although he went up there for the purpose of making a genuine effort to get the property, "that is to say, if I could do so without any interference by any one; I felt that we must necessarily do that" (Tr. pp. 493, 494). "I should have taken it if I had found no objection or obstruction in the way" (Tr.

p. 494). "I went myself, instead of sending the execution to the sheriff; considered we were laying the foundation for complying with the change of policy dictated by our clients" (Tr. p. 495). We endeavored to get possession of the property up to the time there came the idea of a change of policy (Tr. p. 496).

The defendants were not allowed to show what this change of policy was or when it took place, or to show that Judge Cooper went up there with instructions, not to take the property, but to lay the foundation of an action on the bond, the change of policy referred to. This evidence shows that Scott was contending that Hutchins had turned over the property and that no further claim was made; while Bierce's attorney was refusing to accept it under the conditions, which conditions could only refer to the claim of Paris, which was to other property, or the fact that some of the rails had been taken up, which the Bierce Company would have had to do. This is conclusively shown by the written notice served on Nahale at the time by Scott for Hutchins, reciting that Hutchins had surrendered and delivered the property on the 19th of April and paid the damages, and objecting to any further cost being incurred or to the levy of the execution, since he had turned the property over on the 19th of April and had not exercised any right or control over it since, and requesting that as the cross-ties were the property of the defendants as little injury as possible

should be done in taking up the rails (Tr. pp. 158, 159, 385, 416, 417).

Under the instruction of Judge Cooper, the sheriff on the 23rd of May made the following return: "I return this writ of execution unsatisfied, being unable to levy upon the properties therein described" (Tr. p. 45).

Hutchins' exceptions were sustained January 28, 1905. A petition for rehearing was denied April 29, 1905, by the Supreme Court of Hawaii (16 Haw. 418, 717), and, against the objection of the defendant Hutchins, a judgment was entered May 6, 1905, in favor of the defendant (Tr. p. 743), from which an appeal was allowed by the Supreme Court of the United States December 4, 1905 (Tr. p. 744), and a *supersedeas* granted March 5, 1906 (Tr. p. 746), the judgment being reversed by a decision filed April 8, 1907 (205 U. S. 340). On September 10, 1907, the Supreme Court of Hawaii held that the defendants should be allowed to present any points raised by the bill of exceptions not covered by the opinion of this court (18 Haw. 374). On December 20, 1907, the exceptions were overruled (18 Haw. 511). From this an appeal was taken, which appeal was dismissed, for lack of finality, by this court December 14, 1908 (211 U. S. 427).

To the complaint in this action the executors filed a plea in abatement, setting up the pendency of the original action (Tr. pp. 536, 537), which was overruled (Tr. p. 538). They then filed a demurrer December 29, 1904, alleging, amongst other grounds,

the increase of value, the transfer of the action from the circuit court of the third circuit to the first circuit without the assent of the executors, and the fact that no final judgment had been entered in the original action. This demurrer was overruled (Tr. p. 540).

Various motions of continuance were made, on the ground of the pendency of the original action, which were granted against the objection of the defendants, until after the final decision by the Supreme Court of Hawaii, when, pending the appeal by the defendant in the original action, the case was set and a trial had in May, 1908. Before proceeding to trial, plaintiff dismissed as to the defendants Clinton J. Hutchins, Trustee, and Arthur B. Wood (Tr. p. 307).

At the conclusion of the evidence for plaintiff, the defendants made a motion for a nonsuit (Tr. p. 608) on various grounds, including the amendment of the complaint as to actual value, the change in the cause of action, that the sureties were released by the judgment of the Supreme Court May 6, 1905, that the action was prematurely brought, that the sureties were released by the change of venue and by the amendment of the Organic Act allowing an appeal to the Supreme Court of the United States. A motion for a directed verdict for the defendants was also made, on the grounds set out in the motion for nonsuit, and also on the further ground that the sureties were released by the tender and return by Hutchins and the action of the plaintiff. These mo-

tions were denied, as well as a request for an instructed verdict for the plaintiff, and the case submitted to the jury under instructions which left little for the jury excepting to find a verdict for the plaintiff.

The case finally ended by the jury's sending for an undischarged mortgage from Hutchins to the Henry Waterhouse Trust Company (Tr. p. 142), the existence of which the plaintiff did not know, and which had been paid (Tr. p. 517), and upon this the jury found a verdict for the plaintiff (Tr. p. 738) under an instruction (Tr. p. 710) that the mere fact that it was recorded gave notice to the plaintiff that the legal title was in Henry Waterhouse Trust Company, and, even if an actual tender was made, the jury could take into consideration the fact that the conveyance was on record in deciding whether plaintiff was justified in refusing the tender (Tr. p. 710), and (Tr. p. 711) submitting the question whether Hutchins had authority to return the property; the court having refused an instruction requested by the defendants that if the plaintiff was not influenced in refusing by any of said claims it would not be a ground to justify the refusal (Tr. p. 725).

A motion for judgment *non obstante veredicto* was made by the defendants, the fourteen grounds of which are as follows (Tr. pp. 727-729):

"1. That the complaint does not show any cause of action against these defendants.

2. That the action was prematurely brought and

that no valid claim has been presented to the defendants and rejected by them, and that the evidence shows that a reasonable time had not elapsed after the alleged presentation of the claim before this action was brought in which to approve or reject said claim.

3. Upon all the grounds set out in plea in abatement filed by the defendants in this action.

4. That the evidence shows that there was no consideration given for the bond in suit, and that it is not binding on these defendants.

5. That at the time when this action was brought the judgment entered against the principal defendant, Clinton J. Hutchins, Trustee, was stayed by the proceedings taken on the bill of exceptions to the Supreme Court of Hawaii, and that as against the defendants in this action the Circuit Court of the First Circuit had no authority to order any further bond or security on appeal to be given, or to order said judgment to be enforced or execution to issue thereon, since the act under which said orders were made went into force on August 1, 1903, subsequently to bringing of the replevin action of Bierce vs. Hutchins, Trustee, and the giving of the re-delivery bond on which this suit was brought.

6. Because said judgment in the replevin action of Bierce vs. Hutchins rendered in the Circuit Court of the First Circuit was reversed by the Supreme Court of Hawaii on the 28th day of January, 1905, and also by the order of May 6, 1905, and that at the time of the giving of the re-delivery bond upon which this suit was brought said judgment of the Supreme Court of Hawaii was final and conclusive as to these defendants, and that the subsequent passage of the act of Congress March 3, 1905, amending the Organic Act, did not and could not affect the liability of these defendants and the sureties upon said bond, the said bond being entered into with reference to existing provisions of law and the

same becoming a part of the contract; and the subsequent reversal of the decision of the Supreme Court of Hawaii and the entry of the order of said Supreme Court setting aside its former decision and overruling the exception does not affect the sureties on said bond or the liability of the defendants in this action, whose liability was terminated by the said procedings in the Supreme Court of Hawaii January 28, 1905, and May 6, 1905.

6a. That the contract of the sureties on the re-delivery bond was altered, changed and *or* extended by the appeal to the Supreme Court of the United States under and by virtue of the amendment of March 3, 1905, of the Organic Act by the plaintiff in the said replevin action of Bierce vs. Hutchins, Trustee.

7. Because the affidavit in replevin and the complaint based on the affidavit setting out the sworn value of the property in suit, upon which affidavit and complaint by law the re-delivery bond is based, which bond recites that the property is 'of the value of $15,000, as stated in the affidavit filed herein,' is and are judicial admissions made by the plaintiff in this action, upon which the sureties in signing said re-delivery bond had a right to rely, and as to the sureties, the defendants in this action the plaintiff is estopped to claim that the value of said property is more than $15,000; and the subsequent proceedings by which the allegations of said complaint were amended to increase the alleged value first to $20,000 and then to $22,000, and the recovery of judgment for $22,000 as the value of said property, operated to release the sureties from the obligation of said re-delivery bond and are not binding against said sureties, the defendants in this action.

8. That the amendment to the complaint in said action, by which the cause of action is alleged to arise wholly out of the contract of March 13, 1901,

and not out of the contract of February 21, 1901, constituted a change of the cause of action upon which the said re-delivery bond was given and released the sureties from their obligation under any judgment rendered in said action.

9. Because the uncontradicted evidence shows an offer to return the property in accordance with said bond, and a tender of the same, which discharged the sureties upon said bond.

10. That, whether a valid tender of said property were made or not, the offer to return, duly made, was so far accepted by the plaintiff that it operated as a discharge of the sureties upon the said bond.

11. That the so-called option to the Kapiolani Estate, Limited, and the notice to it given by the plaintiff April 19, 1904, subsequent to said offer to return, by means of which the plaintiff disabled itself for thirty days to remove the property from its *situs*, coupled with its notice to the defendant in the suit not to use or disturb the property in the meantime, and the fact that the uncontradicted evidence in this case shows that no action was taken by the plaintiff until after the expiration of said thirty days, viz., until the 20th day of May, 1904, and that the said defendant, Clinton J. Hutchins, Trustee, did not disturb or use said property during said time, in law discharged the sureties upon said bond from further liability.

12. That after the Kapiolani Estate, Limited, on April 14, 1904, had accepted from plaintiff a thirty-day option to purchase the property covered by the replevin bond, and while said option was outstanding and in force and effect, the said plaintiff had caused execution to issue in the replevin action and to be delivered into its possession on April 15, 1904, it then and there became the duty of the said plaintiff, acting in good faith to the surety on the replevin bond, to cause said execution to be immediately placed in the hands of the sheriff and exe-

cuted; that said execution was not so immediately executed, but on the contrary was held and secreted in the hands of plaintiff's attorneys at law and in fact was not placed in the hands of the deputy sheriff for the purpose of execution until May 21 or May 23, 1904, and after said option had expired; that said delay was prejudicial to the rights of the surety, and as a matter of law released the surety.

13. That the original action was still pending at the time when this suit was brought.

14. That there is no evidence upon which a verdict could be rendered for any sum against these defendants."

A motion for a new trial was also made (Tr. pp. 729-733), on numerous grounds. These were overruled (Tr. p. 739). The case was taken by exceptions to the Supreme Court of the Territory of Hawaii, and on April 12, 1909, the opinion of the court was filed, the majority holding that the increase in the allegation of the actual value of the property to $22,000 and the recovery of judgment for that amount discharged the sureties (19 Haw. 398), and that the motion for judgment *non obstante veredicto* should have been allowed on that ground; not passing upon the remaining grounds of the motion or the remaining exceptions. A rehearing was denied May 4, 1909 (19 Haw. 594), on the 5th day of May the Supreme Court filed its decision, notice was given to the circuit court on that date (Tr. pp. 124-126), and on the 29th of May judgment was entered in that court for the defendants accordingly (Tr. p. 126); to which the plaintiff excepted, on the ground that it was contrary to law (Tr. p. 127), and

took the case to the Supreme Court of Hawaii by writ of error, seven errors being assigned, all of which are grounded in rendering the judgment *non obstance veredicto.* November 23, 1909, judgment was entered affirming the judgment of the circuit court (Tr. pp. 766, 767).

The case comes to this court on writ of error.

We are embarrassed, as we were upon the appeal by the plaintiff in the original case of Bierce vs. Hutchins, by the fact that the point passed on by the Supreme Court of Hawaii in this case, as in that, is a narrow point of law; whereas here, as in that case, we are contending that the uncontradicted facts show that the defendants were entitled to judgment. It has never been determined in this court whether the court will review more than the question of law passed upon by the court below, but in order to save any question, in case it should be contended that these points were open upon this appeal, we shall argue all the grounds of the motion for judgment *non obstante veredicto* and also, briefly, present the grounds on which our exceptions should have been sustained. As the writ of error reviews the granting of the motion for judgment *non obstante veredicto,* the whole of that motion at least is before the court.

POINTS AND AUTHORITIES.

I.

THE SURETIES WERE DISCHARGED BY THE AMENDMENTS INCREASING THE VALUATION OF THE PROPERTY TO $20,000 AND $22,000 AND THE RECOVERY OF JUDGMENT FOR THAT AMOUNT.

(*a*)

The bond was given in an ancillary proceeding to secure the possession of property before judgment. The foundation of this ancillary proceeding is an affidavit in which the plaintiff fixes the actual value, and the contract is entered into with reference to the value so fixed.

At common law the action of replevin was commenced by an original writ issued out of the court of chancery to the sheriff of the county where the goods and chattels were to be replevied. To obviate this inconvenience in distant parts of the kingdom, the statute of Marlbridge, 52 H. 3, c. 21, was passed, providing for a complaint to the sheriff, which dispensed with the writ, and the proceedings were taken under what was called "a proceeding by plaint." (*Anderson vs. Hapler,* 34 Ill. 436; 85 Am. Dec. 318. *Bardwell vs. Stubbert,* 17 Neb. 485; 23 N. W. 344.) But the statute of Marlbridge did not abolish the method by original writ (Co. Lit. 145,

F. N. B. 69). By the statute of Westm. 2 (13 Ed. 1, st. 1) it was provided that the sheriff should receive from the plaintiff pledges for pursuing the suit and for the return of the beasts if return be awarded.

Under the American system the plaint or affidavit may be the foundation of the action itself or of an ancillary or collateral proceeding, by which the plaintiff can obtain the possession of the property before the conclusion of the action If the foundation of the action, it is jurisdictional; if the foundation of the ancillary proceeding, it is only jurisdictional as to that (34 Cyc. 1428). In a number of States there are statutory provisions providing for a return to the defendant before delivery to the plaintiff, upon a prescribed bond or undertaking. In Pennslyvania and the Federal court this seems to be the practice without statute (34 Cyc. 1459).

In Hawaii, Chapter 34, Revised Laws of 1905 (Laws of 1884, Ch. 38), provides that the plaintiff in a replevin action may claim the delivery of the property sought to be recovered at any time before issue is joined, provided he makes an affidavit showing, among other things, (1) a particular description of the property and "(4) the actual value of the property" (Sec. 2102). By an endorsement on the affidavit or other written request, he can give notice to seize the property (Sec. 2103), provided he accompanies it with a written undertaking, with two or more sureties, "in double the value of the property as stated in the affidavit," whereupon the sheriff "shall forthwith take the property described

in the affidavit" and "serve on the defendant a copy of the affidavit, notice and plaintiff's undertaking" (Sec. 2104). After holding the person approving the sureties responsible for their sufficiency and providing for objections to the surety and justification, the statute directs (Sec. 2109) delivery to the plaintiff, unless the defendant require the return thereof by giving the sheriff a bond executed by two sureties "to the effect that they are bound in double the value of the property *as stated in the affidavit*" (Sec. 2111). All the notices, undertakings and affidavits, and the proceedings of the sheriff, are to be returned into court.

This act has been construed, and it has been held, that the proceedings by which possession of property is secured are entirely independent of the main action.

"It becomes necessary to examine the Act, commonly called the 'Replevin Act' (Chapter XXXVIII of the Laws of 1884), under which the horse in question was seized. Its title is, 'An Act to regulate the Practice in Suits for the Recovery of Personal Property.' The first section prescribes that 'the plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons or at any time before issue being joined in such action, claim the delivery to him of such property, as provided in this chapter.' The statute thereafter prescribes the steps which the plaintiff must take in order that the property shall be delivered to him. This process is entirely distinct from the summons, is served on the defendant, and before issue is joined. The summons discloses the plaintiff's claim of title to the property, and the ob-

ject of the suit is to try this title. The process detailed in the Act is merely to enable the plaintiff to obtain immediate possession of the property he claims. An action of replevin, or a suit to obtain possession of personal property, may be begun without resorting to this Act of 1884, to obtain immediate possession of the property."

Ah Leong vs. Kee You, 8 Haw. 416, 418.

"But it was error to dismiss the cause even if the affidavit did not comply with the statute. Reference to the statute of replevin makes it clear that the proceedings by which a plaintiff may obtain immediate possession of personal property for which he brings action to recover are entirely independent of such action. He may not desire the immediate possession of the property and not file any affidavit. In such case the action would proceed and the title to the property be tried. The legal effect of a defective affidavit in replevin would be *merely to annul the delivery taken in pursuance of it.* The legality of the seizure is the only question involved and not the right in the property. We so held in *Ah Leong vs. Kee You,* 8 Haw. 418."

Achi vs. Alapai, 9 Haw. 591, 592.

And such is the rule elsewhere. (34 Cyc. 1429, and cases cited. *Smith vs. Fisher,* 13 R. I. 624. *Simpson vs. Wilcox,* 18 R. I. 40; 25 Atl. 391.)

(*b*)

This is a statutory bond, into which all existing provisions of law enter, including that under which the plaintiff fixes the actual value on which the bond is conditioned. The sureties can rely upon this statutory provision, and in order to be bound

to an increased value, or by subsequent legislation, the intent of the surety to be bound must appear on the face of the bond.

The plaintiff's contention is that the surety contracts with reference to existing provisions of law, including the power to amend pleadings and process (Sec. 1738), the power of Congress and the Legislature of Hawaii to pass subsequent laws affecting the remedy, and that the sureties are in privity with their principal and bound by a judgment against him.

As a general proposition, the latter is settled in this court.

Sweeny vs. Lomme, 22 Wall. 208.

Douglass vs. Douglass, 21 Wall. 98.

Our proposition is that while a surety is, in the absence of fraud or collusion, bound by a judgment as to all issues necessarily adjudicated against him, these issues must be within the terms of his obligation; that while the plaintiff contracts with reference to the power to amend pleadings and process and to changes in the remedy, these changes must not be such as to alter the contract, to increase his obligation or to impose a new and additional obligation upon the sureties; further, that *all* existing provisions of law entered into the contract, and particularly that provision under which the plaintiff fixed the actual value, gave bond at double that value as a condition to the right to secure posses-

sion of the property, and the surety became bound in double that value to prevent the plaintiff's taking possession, and unless the surety contracted to be bound by an increased value or by subsequent legislation, and this appears on the face of the bond, he cannot be held liable.

"Sureties on a replevin undertaking undoubtedly are concluded by the judgment in replevin; that is, if the court finds the right of the property or right of possession in one of the parties, the surety can not attack such judgment collaterally, where there is no collusion or fraud to evade his liability on his undertaking. But they are liable only to the extent they are made so by law."

Lee vs. Hastings, 13 Neb. 508; 14 N. W. 476, 478.

The laws in force at the time and place of executing a contract, which affect the right of the parties to a contract, enter into the contract and form a part of it, without any express stipulation to that effect.

Bronson vs. Kinzie, 1 How. 311.

Von Hoffman vs. Quincy, 4 Wall. 535.

West River Bridge vs. Dix, 6 How. 793.

Walker vs. Whitehead, 16 Wall. 314.

Barnitz v. Beverly, 163 U. S. 118, 127.

In order to bind the sureties, the bond itself must show an intent to be bound by subsequent legislation as a part of the bond itself.

Miller vs. Stewart, 9 Wheat. 680.

United States vs. Kirkpatrick, 9 Wheat. 720.

United States vs. Powell, 14 Wall. 493.

Mix vs. Vail, 86 Ill. 40.

The rule in reference to the surety has been well stated by Chief Baron Pollock in *Berwick vs. Oswald,* 3 El. & Bl. 653, 678:

"I think every contract (which does not expressly provide to the contrary) must be considered as made with reference to the existing state of the law; and if, by the intervention of the Legislature a change is made in the law which in any degree affects the contract, such contract, made without some clear and distinct reference to the prospect or possibility of a change, does not hold, with reference to the state of things as altered by the new law."

The same rule must necessarily be applied to an increase of liability under an existing statute, when the contract is specifically entered into with reference to another existing statute which fixes that liability.

(*c*)

The defendants' contract is to be strictly construed, and doubts are resolved in favor of the surety.

The true inquiry, therefore, is, what is the rule to be applied in a case where it appears that the contract of a surety has been altered without his knowledge or consent and where it appears that the effect of the alteration is to augment his liability? * * * "Substance of the rule is, that any variation in the agreement to which the surety has sub-

scribed, which is made without the surety's knowledge or consent, and which may prejudice him, or which may amount to a substitution of a new agreement for the one he subscribed, will discharge the surety, upon the principle of the maxim *non hoec in foedera veni.*"

Smith vs. U. S., 2 Wall. 219.

"The obligation of suretyship arises only from positive contract. This contract is construed strictly both at law and equity, and the liability of the surety cannot be extended by implication beyond the terms of his contract."

United States vs. Price, 9 How. 84, 91.

"It is elementary that the obligation of sureties upon bonds is *strictissimi juris* and not to be extended by implication or enlarged construction of the terms of the contract entered into."

Crane vs. Buckley, 203 U. S. 441, 447.

The obligation of sureties cannot be extended beyond what they have in terms assumed, and, when the obligation is under one law, which has been repealed, cannot be held to be under another law.

United States vs. Hough, 103 U. S. 72.

"A surety is 'a favored debtor.' His rights are zealously guarded both at law and equity. The slightest fraud on the part of the creditor, touching the contract, annuls it. Any alteration after it is made, though beneficial to the surety, has the same effect. His contract, exactly as made, is the measure of his liability; and, if the case against him be not clearly within it, he is entitled to go acquit. *Ludlow vs. Simond*, 2 Cai. Cas., 1; *Miller vs. Stewart*, 9 Wheat. 681."

Magee vs. Life Ins. Co., 92 U. S. 93.

A surety has a right to stand upon an exact compliance with the stipulation of his bond, and his liability cannot be extended by implication beyond the terms of his contract.

Prairie State Nat. Bank vs. United States, 164 U. S. 227.

Where a bond recited that the person was about to be a distiller in one place on the corner of Hudson street and East avenue, the sureties were not liable for taxes where the business was carried on at another place at the corner of Hudson and Third streets in the same town.

United States vs. Boecker, 19 Wall. 652.

"Again, the contract of a surety is strictly construed, and his liability is never extended beyond the terms of his agreement, or, at least, its manifest purport. In case of doubt, the doubt is generally, if not universally, solved in his favor."

Stull vs. Hance, 62 Ill. 52, 55.

And such is the rule in Hawaii.

"It is at least doubtful if the condition of the bond can be construed as referring to anything but the legal duties of the clerk, and a doubt is fatal to the liability of the sureties, whose undertaking is to receive a strict interpretation and is not to be extended beyond the fair scope of its terms. *Miller vs. Stewart,* 9 Wheat. 680."

Supt. Pub. Works vs. Richardson, 18 Haw. 523, 525.

(*d*)

The surety has a right to stand upon the exact

terms of his contract. The actual value fixed by the affidavit was an exact term of his contract, made so by statute. A variation from this term is fatal to his liability.

The case chiefly relied upon by the Hawaiian court is one in which a bond was given for the appearance of the defendant at a designated term of the court and at any subsequent term to be thereafter held, and a stipulation was entered into, approved by the court, that the case should be brought to trial only after final decrees in certain civil actions. This was held to discharge the sureties, as a change of contract, although the change was made by the court.

Reese vs. United States, 9 Wall. 13.

Of the Reese case the Supreme Court of Hawaii says:

"There was a modification, by proper authority, of the terms of the principal's undertaking to appear, which was held to be an entire discharge of the contract of the sureties."

Bierce vs. Waterhouse, 19 Haw. 398, 405.

The Reese case has been repeatedly approved in this court.

Cross vs. Allen, 141 U. S. 528.

Prairie State Nat. Bank vs. United States, ubi supra.

United States F. & G. Co. vs. United States, 191 U. S. 416.

The proposition set forth in the heading is sustained by abundant authority. Thus, this court has said:

"Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the *extent*, and in the *manner*, and under the *circumstances* pointed out in his obligation, he is bound, and no farther. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal. And courts of equity, as well as of law, have been in the constant habit of scanning the contracts of sureties with considerable strictness. * * * The whole series of them, from *Lord Arlington vs. Merrick* (2 Saund. 412), down to that of *Pearsall vs. Summersett* (4 Taunt. 593), proceed upon the ground that the undertaking of the surety is to receive a strict interpretation, and is not to be extended beyond the fair scope of its terms."

Miller vs. Stewart et al., ubi supra.

"In judging of the character or sufficiency of the defense alleged for the exemption of the appellee, there should be taken as a guide the rule, which is perhaps without an exception, that sureties are never held responsible beyond the clear and absolute terms and meaning of their undertakings. Presumptions or equities are never allowed to enlarge or in any degree to change their legal obligations."

Leggett v. Humphreys, 21 How. 66, 76.

"There is a principle that pervades the whole doctrine, on the relation subsisting between the creditor and a security debtor; that is, that the obligation shall *by no liberal intendment,* be carried, in the

smallest degree, beyond the undertaking. And again, that there is no moral obligation on the security beyond, or superadded to, the legal obligation. His obligation being essentially a *legal one,* it would follow that, if not liable in strict law, he is not liable at all. *Winston vs. Rives,* 4 Steward & Porter (Ala.) 269. * * * The language of Judge Trumbull, of the Supreme Court of Illinois, in *Sharp vs. Beddell,* 5 Gilman 88: * * * 'It matters not that the parties executing the bond may have derived from it all the advantages which a perfect bond would have given them, or that they even intended to execute such a bond as the law required.' * * * In *Myers vs. Parker,* 6 Ohio St. 501, the Supreme Court of Ohio said: 'No principle is better settled than that a surety has a right to stand upon the *very terms* of his contract.' "

Bauer vs. Cabanne, 105 Mo. 110, 118, 119.

"The reply to all this is that the bond speaks for itself; and the law is that it shall so speak; and that the liability of sureties is limited to the exact letter of the bond. Sureties stand upon the words of the bond, and if the words will not make them liable, nothing can. There is no construction, no equity against sureties. If the bond cannot have the effect according to its exact words, the law does not authorize the court to give it effect in some other way, in order that it may prevail."

The State vs. Medary, et al., 17 Ohio 554, 565.

In New Jersey it has been held that a variation between the affidavit and the writ discharges the bail bond, on the ground that, the statute requiring an affidavit in order to hold the bail, it should be stated truly in order that bail may safely come forward relying on the terms of the affidavit.

Robeson vs. Thompson, 9 N. J. L. 97.

The condition of the obligation recites that it is to deliver certain property "of the value of $15,000 as stated in the affidavit filed therein * * * if such delivery be adjudged, and payment to said plaintiff be well and truly made of such sum as may, for any cause be recovered against the defendant." This clearly means for any sums which may be recovered for damages or for costs. The alternative judgment is not a sum recovered against the defendant, but only a sum recovered in case there is no return. It is, in other words, a fixing of the alternative value, which the plaintiff in the bond has limited to $15,000, but which the defendant, who had no part in fixing the bond, could reduce below that sum upon the trial, as we shall hereafter show.

(*e*)

The plaintiff is estopped by its affidavit, on the faith of which the surety contracted. It is a solemn admission on its part, which it cannot retract as against these defendants.

The principle which underlies this is well stated by Greenleaf:

"The law of estoppel is not so unjust or absurd as it has been too much the custom to represent. Its foundation is laid in the obligation which every man is under to speak and act according to the truth of the case, and in the policy of the law, to prevent the great mischiefs resulting from uncertainty, confusion, and want of confidence in the intercourse of men, if they were permitted to deny that which they

have deliberately and solemnly asserted and received as true."

1 Greenleaf on Evidence, Sec. 22, p. 117 (16th Ed.).

"In addition to estoppels by deed, there are two classes of *admissions* which fall under this head of conclusive presumptions of law; namely, *solemn admissions,* or admissions *in judicio,* which have been solemnly made in the course of judicial proceedings, either expressly, and as a substitute for proof of the fact * * * and *unsolemn admissions.* * * * The latter class comprehends, not only all those declarations, but also that line of conduct by which the party has induced others to act, or has acquired any advantage to himself."

1 Greenleaf on Evidence, Sec. 27, p. 122 (16th Ed.).

It has uniformly been so held in suits on the plaintiff's bond where, under the statute, he fixes the value.

"And the court further held, that the party who made the bond, and fixed the value, might well be bound by it, as was decided in *Gordon vs. Jenney,* 16 Mass 465, and that it did not follow that the other party, who had no agency in fixing the amount, should be concluded by it, because the property had risen in value. * * * The only mode, therefore, to give the plaintiff the indemnity to which he is entitled, is, to take the estimate of the value as set out in the replevin bond."

Parker vs. Simonds, 8 Met. 205, 212.

Kafer vs. Harlow, 5 Allen 348.

Leighton vs. Brown, 98 Mass. 515.

"When it is considered that the plaintiff in re-

plevin sets his own value upon the goods, and takes them out of the possession of a person *prima facie* entitled to the custody of them, and undertakes to prove a title in himself, which he subsequently fails to do, there seems to be no hardship in holding him to the value fixed in his writ. * * * This implies that the plaintiff in replevin is bound by his valuation. * * * We are of opinion, therefore, that in an action on a replevin bond, the valuation in the writ of replevin, as a general rule, is to be considered the value of the property."

Huggeford vs. Ford, 11 Pick. 222, 223.

Swift vs. Barnes, 16 Pick. 194.

"Such a rule, if law, is in accordance with justice and reason. The allegation of value in the affidavit of the plaintiff is solemnly made and sworn to. The writ is under its control. It was placed in the sheriff's hands by its procurement. The issuance and service was caused by it as the actor, and the sheriff, in every instance, acted for the company. The bond of the plaintiff and sureties taken by the sheriff in double the value of the property fixed by the plaintiff, is a judicial admission and a conclusive presumption of law. See 2 Sedg. Dam. (7th Ed.), p. 431. To hold the plaintiff and his sureties bound thereby *is a rule of protection for the general good.* The same principle is applied in England. *Middleton vs. Bryan,* 3 Maule & S. 155. * * * The statute requires that the plaintiff, or some one else on his behalf, shall give to the sheriff, etc., a bond with sufficient security in double the value of the property about to be replevied. The plaintiff prepares the bond required by the statute, and in order to comply therewith estimates the value, and gives a bond in double the amount thereof. Such act estops the principal and sureties from denying the truth of the admission."

Vulcan Iron Works vs. Cyclone Steam Snow Plow Co., 48 Fed. 652.

This is in effect a forthcoming bond and is conclusive against the assertion of larger amount.

Smith vs. Packard, 98 Fed. 793, 800.

"The statement as to the value of the property, made in the affidavit at a time when the plaintiff is seeking to obtain possession, must be regarded as estopping him from asserting a different value. After fixing it at such a time, plaintiff should not be heard to complain of the value so fixed by him, save in exceptional cases. Wells Repl., Secs. 569, 660, and cases cited. The presumption is that the defendant relies and acts on the statement as to value in subsequent proceedings,—such, for instance, as when he determines whether he shall avail himself of the privilege of rebonding and retaining possession. As remarked by Mr. Wells, the enforcement of the rule is calculated to promote a fair and reasonable estimate of value in the bond and affidavit by the party seeking to obtain possession."

Weyerhauser vs. Foster, 60 Minn. 223, 224; 61 N. W. 1129.

"The plaintiff in the replevin suit, in his affidavit, swore that the piano was of the value of $400. The bond was read in evidence, and, in our opinion, sufficiently established the value of the piano. The recital in the bond, that the piano was of the value of $400, was a solemn admission of theappellants, and which, in an action upon the bond, would estop them from denying the truth of the admission."

Wiseman et al. vs. Lynn, 39 Ind. 250, 259.

"When a party makes an admission in any instrument under his hand and seal, he is estopped from disputing the facts which it recites."

Trimble vs. The State, 4 Blackf. 435, 437 (Ind.).

"It will be remembered that the complaint in the replevin action alleged that the property was of that value, and that the undertaking executed to secure the possession of the property contained the same recital. Such averment was binding upon Mrs. Learned and estopped her from contradicting the value she placed thereon."

Capital Lumbering Co. vs. Learned, 36 Ore. 544, 548; 59 Pac. 454.

"The plaintiffs having sworn in their affidavit upon which the writ of replevin was issued that the property was worth $1,000, and having distinctly alleged the same fact in the declaration, it would have been competent for the court to have instructed the jury that that fact was admitted. This, however, was not done directly, but the same result was reached by permitting defendant to read the affidavit to the jury, and refusing to allow plaintiffs to introduce evidence tending to prove their own solemn statements to be false. There was no error in this. 1 Greenl. Ev., Sec. 27."

Butts vs. Woods, 14 N. M. 187; 16 Pac. 617, 618.

"When the value of property is to be assessed, the statement in the affidavit of the plaintiff as to the value is frequently regarded as estopping him from asserting a different value. After fixing the value at a time when he was seeking the delivery of the property on the writ, he should not be heard to complain of the value so fixed by himself; but the defendant, who is in no way concerned in so fixing the value, is, of course, not affected by it. * * * The enforcement of this rule is calculated to promote a fair and reasonable estimate, in his affidavit, by the party seeking the delivery."

Wells on Replevin, Sec. 569, pp. 310, 311; Sec. 660, p. 360.

"But with the defendant in replevin it is otherwise. As he has no hand in fixing the value of the writ, he is not estopped from showing it to be greater than is there stated. *Thomas vs. Spofford,* 46 Me. 408."

Tuck vs. Moses, 58 Me. 461, 477.

"The plaintiff in replevin, who fixed the value of the property as stated in the bond, is bound by that value, * * * but the defendant in replevin had no concern in fixing the value, and is not bound by any of the recitals in the bond."

Wells on Replevin, Sec. 453, pp. 251, 252.

We have stated these cases at great length because there seems to be some confusion in the mind of the plaintiff, and in courts as well, as to the true rule. An examination, however, makes it easy to deduce a rule, founded in reason and in perfect harmony with the underlying principles on which these decisions rest. The case of the Washington Ice Co. (125 U. S. 426), upon which the plaintiff offered to rest its case in the court below, illustrates this. There the court held that the sureties of the plaintiff, who had described the property and fixed the value at $15,000, were bound by a judgment of $20,069.33, citing the Massachusetts cases, as well as those from Maine, in which jurisdiction the case arose, to the effect that "the plaintiff in replevin is bound by the value which he puts upon the property in his writ; but with the defendant in replevin this is otherwise, and as he has no hand in fixing the value in the writ he is not estopped from showing it to be greater than is there stated," and that the sureties of the plaintiff

"in the replevin bond were represented in the replevin suit by the plaintiff therein and were identified with it in interest and claimed in privity with it, so as to be concluded by the proceedings in that suit." The conclusion is irresistible that the plaintiff, who fixes the amount, and his sureties are concluded. The defendant, who had no hand in fixing the amount, and his sureties are not concluded. Therefore, in this action the plaintiff was concluded as to these sureties that the amount did not exceed $15,000, as it had fixed it, and when it changed the value and procured a judgment on a different value the sureties were discharged, since the plaintiff was estopped from claiming any value in excess of $15,000.

(*f*)

The better rule is that any increase in the pecuniary obligation, without assent, discharges the surety.

This is the ground upon which the Supreme Court of Hawaii rests the case,—that it was a variation of the risk, which was "to be responsible for the return of property of a specified value, or, in default thereof, for the payment of a judgment for its value, together with damages, interest and costs." The increase in the allegation of value increased this risk by $7,000, and thus discharged the sureties.

Not losing sight of the distinction in this case that the value sworn to in the affidavit is the founda-

tion of the proceeding and one of the terms of the bond, and that the change in value is not merely an increase in *ad damnum,* we submit that, in reason and in authority, the rule is that an increase in the value, for which the surety is liable, discharges the surety, unless the surety has contracted in some form to assume the increased risk; as in *United States vs. Powell, ubi supra*, or in the Massachusetts cases, where the law contemplates that he shall have an opportunity to be heard on the question whether the change increased the risk. *Driscoll vs. Holt,* 170 Mass. 262; 49 N. E. 308. And this, although the change is made by judicial authority in a proceeding in which the bond is given.

Sage vs. Strong, 40 Wis. 575.

Tyler Mining Co. vs. Last Chance Min. Co., 90 Fed. 15.

In Maine it has been repeatedly held that an increase even of the *ad damnum* of a writ discharges the sureties on an appeal bond.

Langley vs. Adams, 40 Me. 125.

Moss vs. Sleeper, 58 Me. 331.

Ruggles vs. Berry, 76 Me. 262.

In Massachusetts, also, the court has said:

"We think that after an attachment, or holding to bail, the plaintiff cannot alter his writ to the injury of * * * bail * * * bail are not to be made liable for a greater sum than was included in the writ at the time when they entered into the bail bond."

Willis vs. Crooker, 1 Pick 203, 205.

The cases which are cited contra are largely dicta, not well reasoned, and not upon the exact point.

(*g*)

The sureties' liability arises in the ancillary proceeding, is conditioned on plaintiff's affidavit of value, and therefore their liability is not affected by proceedings in the principal action which do not change the value in the affidavit—the foundation of their liability—and any judgment that is obtained in the principal action is not binding on them, for the plaintiff has elected to proceed in the principal action without further claim to the immediate possession of the property.

In our view, this is the true solution of this point, as we shall show under the next head. The consideration of the sureties' obligation is the right of the plaintiff to take possession of the property, and that right is based, under Sec. 2102, upon an affidavit in which the actual value of the property is sworn to be $15,000. The same allegation appears in paragraphs 6 and 14 of its verified complaint, in the original action, and in the complaint in the present action. It gave, under Sec. 2104, its bond to the sheriff "in double the value of the property as stated in the affidavit," viz., $30,000, and the notice, bond and affidavit, all showing the value to be $15,000, were served on Hutchins. On the faith of this, Hutchins procured the sureties to enter into their

obligation, under Sec. 2112, in double the value of the property as stated in the affidavit, viz., $30,000, reciting, as the condition of the obligation, that the property "was of the value of $15,000 as stated in the affidavit filed therein."

The affidavit is thus the foundation of the ancillary proceeding, and, with the bond, gives the right to immediate possession—the consideration for the sureties' obligation,—and all subsequent proceedings started by it are based on the actual value so stated, including the damages, to which the surety must respond. When, therefore, the plaintiff increased the valuation by $7,000, substantially half as much again as the actual value stated in the affidavit by which it procured the sureties' bond, and leaves the proceeding by which he is entitled to immediate possession, viz., the affidavit and his own undertaking, unchanged, the plaintiff has elected to proceed in the original action without further claim to the immediate possession of the property, as he has a right to proceed, and the surety is released from the obligation to return property to which the plaintiff is not entitled and is not bound by any judgment thereafter rendered. This is peculiarly so, since the value stated in the complaint is no longer the actual value, which the statute requires to be stated in the affidavit, with reference to which he contracted, and is no longer that actual value with reference to which the plaintiff gave the bond which entitled him to the possession. Any other construction of the statute would render the re-

quirement to state the actual value meaningless, and would be a trap to the surety.

The stronger reason is, as we shall show under the next head, that there is no longer any consideration for the sureties' obligation. It has failed; since there is no longer any affidavit showing the actual value, and no longer any undertaking on the part of the plaintiff in double that value, as provided by statute.

(*h*)

The plaintiff's right to take possession of the property before judgment, being dependent on an affidavit of the actual value and a bond in double that amount, failed when the amendment was made, and, with this, the consideration of the agreement of the surety failed, viz., the prevention of the delivery of the property to the plaintiff, which was no longer entitled to it.

Plaintiff's right to the possession of the property before judgment is conditioned upon an affidavit of actual value and his giving bond, with sureties, in double that value. The consideration upon which the redelivery bond stands is that it defeats the right of the plaintiff to take possession.

When the defendant amended his complaint and took judgment on it, he was no longer entitled to the possession of the property pending the action, since he had made no affidavit of its actual value,

nor given any bond in double that value. The consideration of the sureties' obligation failed, since the plaintiff was no longer entitled to the possession of the property, and they cannot be held. The purpose of filing the affidavit describing the property in detail and giving its actual value is that the court and all the parties may see its character and value, and the undertaking of the plaintiff is in double the value so fixed. The plaintiff fixes its own valuation and incurs this obligation in order to procure the possession. The defendant cannot increase the valuation. It can only protect itself by rebonding on plaintiff's valuation if it has set the value too low. In this case the plaintiff could have set the value at $500 and given a bond for $1,000; but the defendant coull have given a redelivery bond in the same figure. Amending its complaint, increasing the valuation by $7,000, without amending the affidavit or giving a new undertaking, it no longer, within the terms of the statute, is entitled to claim the possession of the property during the pendency of the litigation; for it has filed no affidavit showing the actual value of the property at the increased rate, nor has it given bond to the defendant in double that value. Not being entitled to the possession of the property, the consideration of the contract of the surety to prevent its delivery to the plaintiff has failed, and they are not obliged to return it to him, since he was not entitled to take it originally. The plaintiff had a right under Section 1738, to amend as against Hutchins in the principal action; but

when it amended against Hutchins without affidavit and without bond on its part, it had no further right to the possession, the ancillary proceedings fell, and the sureties were no longer liable. Any other construction would lead to the encouragement of perjury and deception. In this case, the parties being at issue, the plaintiff would, in order to get possession of the property, probably have to dismiss its action and begin again, with a new affidavit and bond.

(*i*)

The construction put upon the local statute by the local court should be persuasive, if not controlling, in this court.

The contention of plaintiff before the Hawaiian Court was that the words in the statute (Sec. 2112) "for any cause" included any judgment which might be rendered, including an alternative judgment for value, although for a different value than that alleged in the original affidavit and proceeding, and it contended that the amount of the bond, being double the value, was so made to cover any mistake which may have been originally made in estimating the value. Our contention was that the words "for any cause" were inserted in the statute to cover the judgment for damages and costs in addition to the recovery of the property or its value as specified, and the Hawaiian Court has sustained our contention, saying:

"The responsibility for 'such sum as may for any cause be recovered against the defendant' evidently refers to recovery upon the action recited. *The Oregon,* 158 U. S. 186, 206. The risk in this case was to be responsible for the return of property, of a specified value, or in default thereof for the payment of a judgment for its value, together with damages, interest and costs. The penal sum of the bond, $30,000, was the limit of the risk, not the risk itself. The subsequent amendments were not the exercise of a judicial power for which neither party was responsible, but the voluntary act of the obligee, the allowance by the court being formal and largely controlled by statute. R. L., Sec. 1738. By these amendments, in this case made after the death of the surety whose estate is now sought to be charged, the plaintiff increased the risk of the sureties nearly fifty per cent., and actually obtained a judgment for $22,000 with damages and costs. We are of the opinion that this increase of liability was outside the contract of the sureties and that they are discharged."

Bierce vs. Waterhouse, 19 Haw. 398, 408.

We contend that this is a judicial construction by the Hawaiian Court of a Territorial statute which should be persuasive, if not controlling, with this court.

Kealoha vs. Castle, 210 U. S. 149, 153.

Kawananakoa vs. Polyblank, 205 U. S. 349.

Copper Queen Mining Co. vs. Arizona, 206 U. S. 474.

II.

THE SURETIES CANNOT BE HELD UNDER A SUBSEQUENT AMENDMENT OF THE ORGANIC ACT GRANTING AN APPEAL TO THIS COURT.

On January 28, 1905, the Supreme Court of Hawaii rendered its opinion; which was admitted by the plaintiff to be decisive in favor of the defendant Hutchins, and under which these sureties would have been discharged from all liability. On March 3, 1905, Congress amended the Organic Act in reference to appeals by adding a provision: "In all cases where the amount involved, exclusive of costs, exceeds the sum or value of $5,000."

The petition for rehearing pending in the Supreme Court would not have authorized an appeal, although acted on after March 3rd.

Harrison vs. Magoon, 205 U. S. 501.

It was well said in that case by Mr. Justice Holmes:

"A party cannot evoke a new one by filing a petition for rehearing, even if, by accident, it is kept along until an act giving an appeal is passed."

The alleged judgment of the Supreme Court of Hawaii, entered, in effect, *ex parte,* is without authority of law.

Meheula vs. Pioneer Mill Co., 17 Haw. 91.

Cotton vs. Hawaii, 211 U. S. 162.

And such seems to be the view taken by this court.

Hutchins vs. Bierce, 211 U. S. 429.

Bierce vs. Waterhouse, 19 Haw. 594.

And yet under this void judgment, without any right of appeal to this court, these defendants are charged not only with the result of that appeal, in reference to which they never contracted, but also with a large bill of costs arising under it. The grounds on which they are discharged are:

(*a*)

All the proceedings subsequent to the denial of the petition for rehearing are coram non judice.

"We are of the opinion that this court can take no other action on overruling the exceptions than to authorize the usual remittitur."

"This court has by law no power in overruling exceptions to make a judgment in the case tried in the circuit court, and such judgment is not required 'for the promotion of justice in matters pending before it,' for nothing is pending."

Meheula vs. Pioneer Mill Co, ubi supra.

The court in that case refused to assume the power which it did not have to enter a final judgment in order to authorize an appeal.

This case has been cited with approval in this very action, this court saying, in its opinion delivered December 14, 1908, dismissing the appeal of the plaintiff in the original action and holding that

there was no appeal from a judgment on exceptions to the Supreme Court of the United States:

"It may be that in its present opinion the former judgment was unwarranted in point of procedure. (*Meheula vs. Pioneer Mill Co.,* 17 Haw. 91.)"

We respectfully submit that if the judgment entered by this court, from which the first appeal was taken, was unwarranted, as it was not asked for nor assented to by the appellant, which at the time of its granting counsel refused to recognize, and not properly within the jurisdiction of this court, it can have no effect on the surety, even if on the principal, and that the subsequent proceedings of this court purporting to be under the mandate of the Supreme Court of the United States can have no effect upon him; for, even if his principals could waive the question of jurisdiction, it could not be waived as to the surety, and he is released by submitting the cause to a tribunal without jurisdiction, in the same way that he would be released by its being submitted to arbitration.

Even if the sureties' principal could waive the question of jurisdiction in the Supreme Court of the United States, it could not be waived as to the surety.

Oskosh Water Works Co. vs. Oshkosh, 106 Wis. 83; 81 N. W. 1040.

"The liability of a surety is *strictissimi juris,* and cannot be extended by implication. He has a right to stand on the exact words of his contract. * * *

The deviation from the statutory requirement is one of substance. The surety may have been quite willing to enter into the engagement to pay the costs, if the appellant should be defeated on a trial in Eau Claire county, in the city where the alleged cause of action arose, and quite unwilling to undertake for the payment of costs, in like event, of a trial in a distant county, greatly increased by the travel of witnesses and the costs of subpoenaing them. A similar ruling in *Myres vs. Parker,* 6 Ohio St. 502-504, sustains the conclusion at which we have arrived, that the bond under consideration is not a substantial compliance with the statute." *Drinkwine vs. Eau Claire,* 83 Wis. 428; 53 N. W. 673.

Oshkosh Waterworks Co. vs. Oshkosh, 187 U. S. 437.

Nor can it be said that the surety can be held by the subsequent proceedings in the Supreme Court of Hawaii and in the Circuit Court, for these were taken in pursuance of a void appeal and long after the term at which the judgment had been rendered had expired.

(b)

If the amendment to the Organic Act applied, then the granting of the new right of appeal to another jurisdiction extended the liability of the surety, exposed him to the judgment of a court, with reference to which he did not contract, and imposed upon him a new pecuniary obligation, viz., the costs of that court.

We have already shown that the existing laws enter into and become a part of the contract of the

sureties. In this case, had no new right of appeal been given, the surety would have been discharged. We cite, however, additional cases to the point that the obligation depends on the law as it stood when the contract was made, and that the legislature cannot subsequently require the performance of further conditions or increase the liability of the sureties thereby.

City of Lafayette vs. James, 92 Ind. 240.

Bryson vs. McCrary, 102 Ind. 1; 1 N. E. 55.

The remedy cannot be altered so as to increase the obligation of the surety.

Rights cannot be impaired by acting on the remedy any more than on the contract itself.

Pritchard vs. Norton, 106 U. S. 124.

Green vs. Biddle. 8 Wheat. 1.

Bronson vs. Kinzie, ubi supra.

Under this rule, stay laws have been held to impair contract rights.

Aycock vs. Martin, 37 Ga. 124; 92 Am. Dec. 64.

So repealing the right to levy a tax for the payment of bonds.

Von Hoffman vs. Quincy, ubi supra.

Seibert vs. Lewis, 122 U. S. 284.

Shapleigh vs. San Angelo, 167 U. S. 646.

So of taxation to satisfy judgments.

Butz vs. Muscatine, 8 Wall. 583.

Nor can the place of payment be changed.

Dillingham vs. Hook, 32 Kas. 189; 4 Pac. 168.

So of the obligation to receive coupons for taxes.

McGahey vs. Virginia, 135 U. S. 693.

So of laws affecting judgments and executions.

Christmas vs. Russell, 5 Wall. 290.

Daniels vs. Tearney, 102 U. S. 419.

A power of sale mortgage cannot be affected by changing the right of redemption or the power of sale.

Barnitz vs. Beverly, ubi supra .

Clark vs. Reyburn, 8 Wall. 332.

Brine vs. Insurance Co., 96 U. S. 627.

It is not a question of degree, or manner, or cause, but an encroachment in any respect on its obligation dispensing with any part of its force.

Planters' Bank vs. Sharp, 6 How. 301.

Phinney vs. Phinney, 81 Me. 450.

Many of these cases arise under a constitutional provision, but the rule of construction is the same. The contract is construed in accordance with the Constitution. The contract of these sureties should be interpreted in the light of the existing law.

"The security had a right to look to the provisions of this statute, and to calculate his liability."

The People vs. Jansen, 7 Johns. 332.

These cases deal with the impairment of a contract by diminishing its value. The rule is the same when the obligation is increased. Thus, a Missouri case declares that if authority is wanting in the legislature to pass such a law, the court should be loth to put a construction on the law adverse to its policy; and adds:

"When the surety in this case executed the bond by which he is bound, the liability thus incurred was fixed and ascertained by law. Can the Legislature, then, by a subsequent act, say that this liability shall be increased? The existence of such a power in the general assembly cannot be maintained in our form of government."

McCurdy vs. Brown, 8 Mo. 550.

In a case where by a subsequent statute the case was transferred to the Supreme Court, instead of to the Court of Appeals (*Schuster vs. Weiss,* 114 Mo. 158; 19 L. R. A. 182; 21 S. W. 438), it was held that the act of the Legislature imported new conditions into the bond, and refers to *Re Garesche,* 85 Mo. 469, in which they had decided that this could be done as to the suitor but not as to the sureties, for,

"While the Legislature deprived the suitor of a hearing in the court of appeals, it at the same time secured him a hearing in the court of last resort in the state. But it is altogether a different proposition as to his sureties. They are not parties to the suit. They are obligors in a collateral undertaking. They entered into a private contract with Mrs. Schuster, and agreed to be bound on certain conditions. Over their contract was the protection of the Constitution. That contract was made with

reference to the law as it then stood. In the light of that law it must be read."

And again:

"The bond was drawn with reference to the form of procedure subsisting at the time. They could not anticipate a different mode."

The learned judge cites with approval *State vs. Roberts,* 68 Mo. 234:

"A change in the law by which the time for the annual settlement of county collectors is fixed a month later than that provided in the law when the bonds of the collectors were given operated to discharge the sureties."

This case quotes with approval the opinion of Sherwood, J., in an earlier case, in which it was held that a bond given under a statute not contemplating an appeal to the Supreme Court, but to the Court of Appeals, did not bind the sureties to a judgment rendered in pursuance of a mandate of the Supreme Court. (*Nofsinger vs. Hartnett,* 84 Mo. 549.)

"The failure of the court of appeals to render judgment on the appeal, and the transfer to this court, extended the time of defendant's liability on the appeal bond. * * * To say, under such circumstances, this transfer had not increased their peril, would be to shut our eyes, and refuse to see the result. The variance is so clear, and its consequences so manifestly hurtful to defendants, it operated to discharge them, in law and equity, from all further responsibility on this bond. * * * That contract was made with reference to the law

as it then stood. In the light of that law it must be read. After it was made, it was secure from any act of the Legislature, or amendment to the Constitution, impairing its obligations. * * * 'It is perfectly clear that any law which enlarges, abridges, or in any manner changes, the intention of the parties resulting from the stipulations in the contract, necessarily impairs it.'" (*Ogden vs. Saunders,* 12 Wheat. 256.)

Nofsinger vs. Hartnett, 84 Mo. 549.

The learned judge also says that the surety might well be willing to submit to one appeal, but not to a series of appeals; eminently applicable to this case, in view of its result. This case is followed in *Brookshier vs. McElwrath,* 112 Mo. App. 687; 87 S. W. 607.

An injunction bond is construed with reference to the statute in force. A statute passed but not in effect does not become a part of the contract. The latter statute authorized the court to assess damages subsequent to the dissolution; while the earlier statute only covered damages awarded upon the dissolution.

"This cannot be done. It would do more than to affect the remedy. It would affect the obligation of the contract by creating a liability where none at the time existed."

Mix. vs. Vail, 86 Ill. 40.

See also:

Alwood vs. Mansfield, 81 Ill. 314.

Lapsley vs. Brasears, 4 Litt. (Ky.) 46.

Blair vs. Williams, 4 Litt. (Ky.) 34.

But it is otherwise as to an existing law, "because the law was in existence at the time of the contract, with reference to which the parties must be supposed to have contracted, and is a part of the bond."

Haldeman vs. Powers, 103 Ky. 525; 45 S. W. 662.

Aeusch vs. Demass, 34 Mich. 95.

In an Indiana case decided on circuit, Mr. Justice McLean held that the surety under a replevin bond to respond to a judgment was entitled to have the lands sold under the law in force at the date of the bond, and not under a subsequent law, that learned judge saying:

"This being a statutory bond, the liability under it must be enforced conformable to the laws then in force."

Stockwell vs. Kemp, 4 McLean 80; 23 Fed. Cas. 115.

In Virginia, sureties are not bound by a subsequent act allowing damages on an affirmance of a decree in chancery.

Woodson vs. Johns (Mumf.), 18 Va. 230.

This case has been cited with approval in both Virginia and West Virginia.

Jeter vs. Langhorne, 5 Gratt. 193.

Bailey vs. McCormick, 22 W. Va. 95.

A surety might be willing to assume the responsibility of one appeal, but be "wholly unwilling to

be bound to await the end of the decision in the Supreme Court."

Winston vs. Reeves, 4 Stewart & Porter 269 (Ala.).

III.

THE SURETIES CANNOT BE HELD UNDER THE ACT OF 1903, CHAPTER 32, SECTIONS 17, 18, AND 19 (REVISED LAWS, 1905, SECTIONS 1861, 1864, AND 1865), SINCE THAT DID NOT GO INTO FORCE UNTIL AFTER THE EXECUTION OF THE BOND.

(a)

If the act applies to this action, instituted upon its passage, the passage of the act discharged the surety, since it required the surety to return at a different time than he would be required under the existing law.

A statute passed but not in effect cannot have any effect on the bond.

Mix vs. Vail, ubi supra.

We cite also to this point all the authorities cited under II (b).

(b)

The Act of 1903 *does not apply to this case, and*

therefore the action was prematurely brought and the executors cannot be held.

This action was brought whilst an appeal was pending, which stayed the proceedings but for the power given by the statute of 1903 for the court to order the enforcement of the judgment. Under the existing law the court could not require security. The new law went into effect August 1. Therefore, the surety's contract was under the old law, and he was not liable to respond to the judgment until the disposal of the appeal; but, whether this be true or not, there is no provision of law authorizing the court to require any further redelivery bond from the defendant and no rule of court giving such power. Nor is this a money judgment; and therefore the order requiring the bond is void. Moreover, the authority of the statute is to make the order on good cause shown, and the good cause shown was that the defendant had failed to file a new redelivery bond, which was not a good cause, as the court had not the authority to make the order.

IV.

THE ACTION WAS PREMATURELY BROUGHT AGAINST THE EXECUTORS; THE CLAIM BEING STILL IN THEIR HANDS FOR CONSIDERATION, NOT HAVING BEEN REJECTED.

The statute provides (Sec. 1851) a notice to all creditors to present their claims within six months from the day of publication; or, in the event of non-presentation, they shall be forever barred, and the executor not authorized to pay.

Sections 1853 and 1854 are as follows:

SEC. 1853. SUITS ON REJECTED CLAIMS, COMMENCED WHEN. If any claim be rejected by the executor or administrator, he shall give written notice of such rejection to the creditor, and suit must be brought upon it against the executor or administrator within two months after such notice is given, or within two months after the same becomes due, or it will be forever barred.

SEC. 1854. OTHER SUITS, COMMENCED WHEN. Executors and administrators shall in no case be liable to suit until the expiration of six calendar months after probate, or the granting of letters of administration, except in cases of rejected claims as provided in Section 1853.

The claim of September 6th, which was rejected September 26th, was abandoned because of its de-

fective presentation of claim. This is shown by the new claim of September 30th, by the letter of the attorneys for Bierce to the executors accompanying the claim (Tr. p. 159), in which they say that they are correcting the old claim by "putting in a new claim in place of the old one," and earnestly request for prompt action of acceptance or rejection. The testimony in this case shows that this claim was under consideration by the executors, the executor in Hawaii desiring to consult his attorneys and his co-executor, and that, if it was rejected, it was long after the beginning of the suit October 11, 1904 (Tr. pp. 331-338).

The plaintiff in the court below claimed that it was not necessary to wait for the rejection of the claim, and that, for some reason not made clear, the imperfect and rejected claim satisfied the statute.

The Hawaiian Court has said, in a case where a judgment creditor presented a claim, which was allowed, that it was inconsistent for him to attempt to press the judgment:

> "This assertion of claim precluded the judgment creditor from afterwards assuming an inconsistent position to the prejudice of the executrix."
>
> *Ching Tam Shee vs. Oriental Life Ins. Co.*, 19 Haw. 663, 666.

The presentation of the second claim precluded plaintiff from afterwards asserting a right to sue on the first claim.

Upon the second point, that no rejection is neces-

sary, the statute itself would seem to be clear. The executor is obliged to give written notice of the rejection, and suit is to be brought within two months thereafter. Section 1854 refers to "other suits" than suits on rejected claims, which are specifically excepted from the section.

The claim of September 30, 1904, was still in the hands of Albert Waterhouse. He desired to consult his co-executor — his uncle, William Waterhouse,—who resided and was at that time in Pasadena, California, before acting on the claim. On October 11, 1904, the plaintiff brought suit, without waiting for any action by the defendants. Neither does it appear that plaintiff made any inquiry as to what action the executors intended to take. The Hawaiian statute, Section 1853, provides for suit within two months after notice of rejection, "or within two months after the same becomes due." Plaintiff in this case brought suit for rejection. The executor, Albert Waterhouse, was entitled to reasonable time to consider the claim, and suit brought on October 11, 1904, on a claim presented September 30, 1904, is premature.

Or, taking another view of the statute, the plaintiff could sue within two months *after* the claim became *due*. The claim was not due while there was an appeal pending in the replevin suit. That very appeal in the replevin suit resulted in the judgment being reversed by the Supreme Court of the Territory.

That the case was prematurely brought against

the executors on the claim is supported by the following authorities:

Ellsworth vs. Thayer, 4 Pick. 121.
Goff vs. Kellogg, 18 Pick. 256.
Espy vs. Conner, 76 Ala. 501.
Hentsch vs. Porter, 10 Cal. 555.
Keenan vs. Saxton, Admrs., 13 Ohio 41.
Dredla vs. Baache, 60 Neb. 655; 83 N. W. 916.
Fulton vs. Black, 21 Tex. 424.
Walters vs. Prestidge, 30 Tex. 66, 71.

Even if the plaintiff was obliged to bring its action before the final determination of the replevin suit on the appeal (*Corn Exchange Bank vs. Blye,* 102 N. Y. 305; 7 N. E. 49), it was entitled to a distinct rejection before the statute of limitations began, and, on the other hand, it could not subject the executors to cost before such a distinct rejection or at least an unreasonable delay.

"Executors and administrators are entitled to a reasonable time for the examination of claims and accounts against the estate before endorsing thereon their allowance or rejection."

18 Cyc. 503.

"Justice to the claimant, as well as the reasonable interpretation of the statute, requires that the act of the executor or administrator, in disputing or rejecting the claim which is to put the claimant to an action within the brief period prescribed, upon pain of forfeiting his claim, should not be ambiguous or equivocal, capable of two interpretations,

but decided, unequivocal and absolute; such an act or declaration as will admit of no reasonable doubt that the claim is definitely disputed or rejected, so that the claimant will be without excuse for not resorting to his action within the time required to save his claim. To construe and apply the statute in a manner more liberal to the representatives of estates would make it a trap and a snare to claimants. They might be misled and induced to remain passive until they had lost the right of action by a notice or a declaration so carefully drawn or made as to lull them to rest; while it might be claimed that an intention to dispute or reject the claim was clearly inferable from the language used. The rule is as fairly deducible from the authorities and the statute upon a reasonable interpretation, that whatever may be the language or declaration of the executor or administrator to the claimant, if in the same notice or declaration or at the same time he does or says anything from which the claimant may reasonably infer that the determination to dispute or reject the claim is not final, but that it will be further examined or considered, either upon the vouchers already exhibited or such as may be thereafter presented, the claim is not 'disputed or rejected' within the statute. *Kidd vs. Chapman,* 2 Barb. Ch. 414; *Reynolds vs. Collin,* 3 Hill 36; *Elliot vs. Cronk's Admrs.,* 13 Wend. 35; *Barsalou vs. Wright,* 4 Bradf. 164."

Hoyt vs. Bonnett, 50 N. Y. 538, 543.

V.

THE RETURN OF THE PROPERTY SATISFIED THE OBLIGATION OF THE BOND; OR, IF NOT SUFFICIENT TO SATISFY THE BOND, THE OFFER TO RETURN, COUPLED WITH THE FAILURE EITHER TO ACCEPT OR REJECT THE PROFFERED RETURN FOR FORTY DAYS, DISCHARGED THE SURETY.

(a)

The evidence in this case shows a return of the property to the plaintiff, which was in control of it, through the Kapiolani Estate, for more than a month. It cannot afterwards change its policy and hold the surety on the bond. The evidence is uncontradicted.

Hutchins tendered the property back. The only qualification which he made was that he reserved the right to appeal. This he clearly had a right to reserve. The plaintiff, pending the litigation, could only claim the right to possession under its bond, and the defendant recovered possession by the redelivery bond.

"The property in dispute may be said to be in the meantime in the custody of the law. That is to say, it is represented by the bond, which imports that it

is held by the plaintiff to abide the event of the suit, and to be disposed of accordingly."

Stevens vs. Tuite, 104 Mass. 328, 332.

"The bond stands in place of the property."

Leonard vs. Whitney, 109 Mass. 265.

Walko vs. Walko, 64 Conn. 74; 29 Atl. 243.

Therefore, the suit not being ended, the obligation of the defendant, in case there was no stay, was not to deliver the property absolutely, but to deliver the property to the plaintiff to be held under the bond and to abide the ultimate result of the suit. He had at least a reasonable ground for appeal, since the Hawaiian court sustained it. Nor did the plaintiff at that time object to the reservation of the right of appeal. It cannot now set up reasons which it did not at the time.

Am. & Eng. Enc. of Law, Vol. 28, pp. 34, 38, 40.

Dresel vs. Jordan, 104 Mass. 407.

The uncontradicted evidence shows:

(a) The property was at all times upon the premises (Tr. p. 627).

(b) Hutchins tendered the property and did everything which the plaintiff required (Tr. pp. 152, 386, 390).

(c) The plaintiff accepted tender conditioned on getting actual possession, and agreed to notify at once if it could not secure this (Tr. pp. 153, 154).

(d) It had already given options on the property, and upon the next day after the return completed an option with the Kapiolani Estate, Limited, by which it was to retain the property in its possession on the ground for thirty days from that date (Tr. pp. 160, 161).

(e) The Kapiolani Estate, with whom other negotiations were had, to the character of which, viz., a release of all claims was executed (Tr. pp. 486, 509, 171), did so retain it in its possession as it lay.

(f) Hutchins, as requested by the plaintiff, did not thereafter interfere with the property (Tr. p. 386).

(g) The plaintiff offered on April 26th to sell the property to Hutchins, taking delivery as it lay, at any time within thirty days, subject to the option to the Kapiolani Estate, Limited, thus giving Hutchins notice of that option (Tr. p. 141).

(h) The plaintiff admitted, on May 16th, that the matter of the redelivery had not received from it appropriate attention, still claimed that the property had been tendered and accepted conditionally upon the actual delivery, and asked for the leases in order to determine what right Hutchins had to *maintain* the railroad (Tr. pp. 154, 155).

(i) Forty days after the tender, the Kapiolani Estate option having expired, the plaintiff, having

changed its policy in regard to recovering the property, for the first time gave notice that it was unable to get possession, assigning as a reason that the land owners absolutely refused to allow the removal of the rails (Tr. p. 157).

(j) This was absolutely false, and Hutchins, upon receiving this notice, denied the good faith of plaintiff in making the claim, and insisted that he had long since turned over the property precisely as he had received it (Tr. pp. 157, 158, 506, 638, 639, 440).

(k) Hutchins' agent on the ground gave notice in writing May 23rd that the property had been returned, the judgment paid, that Hutchins had exercised no right or control since the return, and asked that the least possible damage should be done in removing it (Tr. pp. 158, 159, 385, 416, 417, 493).

(l) There had been a change of policy in regard to taking possession, and the plaintiff was no longer desirous of taking possession (Tr. pp. 494, 495, 496).

No argument or authority can add to this statement of uncontradicted facts.

(b)

The offer to return discharged the sureties.

The only ground on which the plaintiff could refuse the tender would be that it was not getting what it was entitled to. But here the property was

tendered in the same condition as it was received. Nor was there any objection to the form or manner of the tender. The plaintiff was bound to state its objections, and the only objection which it made was that it should be an actual delivery. There is not a particle of proof in this case that it could not have had an actual delivery. The property was in the possession of the Kapiolani Estate, to whom plaintiff had entrusted it, and which was estopped to deny the Bierce ownership during the thirty days, and during that thirty days the plaintiff could have taken away the property if it had wanted to but for its option with the Kapiolani Estate. But it is incumbent on the plaintiff to show, having accepted the tender, that it could not secure an actual delivery.

Hutchins, as he was requested, did not interfere. The alleged statements by Scott are denied by him, and no proof offered in support of the allegation. The reason offered for not taking possession was that "the land owners absolutely refuse to allow us to remove the rails in question," and there is not a particle of proof that any land owners refused. None of the rails were on Paris' land. Scott denies having made any objection, and the only objection shown is to taking off the rails from Paris' land. It is true that Cooper testifies, on his original examination, that the result of the conversation with Colburn was "that he wouldn't deliver the property; I can't do it better than that" (Tr. p. 465). On cross-

examination, he recalls the conversation (Tr. p. 488):

A. I think he said something about "You might try to roll the engine," something of that kind; some remark of that kind.

Q. Then he didn't make any objection to your taking off the rolling-stock?

A. Well, he spoke in that way. I don't—I don't remember it as being a permission to take the stock off the property, off the premises.

Q. Well, was it a refusal to let you take off the rolling-stock?

A. I understood his—the result of his conversation would mean a refusal to let me take the property.

Q. Can you remember anything further than the impression that it left on your mind?

A. I think he might have said, "Well, you might try and roll the stock off, engines off and cars off;" he may have said that.

THE COURT:

Q. Why didn't you try?

A. Well, the track was up.

MR. CATHCART:

Q. You didn't make any further attempt at all in the matter, as I understand it?

A. No, I made no attempt.

The next day he voluntarily returned to the stand and stated that he also remembered that he had said to Scott that he "would not accept the property under those conditions" (Tr. p. 491) and "refuse to accept the property as apparently tendered" (Tr. p. 492), and that what he was doing there was to lay the foundation for complying with the change of policy dictated by his client (Tr. p. 495). This is an admission that the property was tendered, that

he was told he could take the property off, but not over the rails, which had been taken up by the Kapiolani Estate. As the only claim of the plaintiff was to the rails and not to the use of the property or the ties on which they lay, or the ground on which the ties were, this evidence fails to sustain the contention that plaintiff could not recover the property, but shows that it could have gotten it if it desired.

(c)

Upon the tender by Hutchins, not only by its agreement, but also by law, the plaintiff was obliged to accept or reject the tender, and it did not do this within a reasonable time, which of itself discharged the sureties.

It has been said that the acceptance of a conditional tender—and in this case the rule would be the same as to the conditional acceptance of the tender—creates a new contract. *Bickle vs. Beseke,* 23 Ind. 18. If so, the surety is discharged as a change in its contract. But whether this is so or not, the only condition imposed was that of getting actual possession, and the plaintiff agreed to notify at once if it could not secure this. No notice was given until May 27th that actual possession could not be procured. If the notice of that date is such a notice, this was an unreasonable delay and discharged the sureties. The plaintiff had the right to a reasonable time to determine whether it could get actual possession, if such time was necessary. But

in this case the plaintiff's attorneys in fact were attorneys for the only party which was litigating over any right of possession, although it appears from the evidence that that party was not claiming the property, but the land on which the property was. Certainly a week was ample time; and this is shown by the declaration of the plaintiff's attorneys themselves, who say on May 16th, 28 days after, that the matter had not received appropriate attention because of the illness of the writer of the letter. But on the 26th of April the writer was not ill, as appears from his signature to a letter offering to sell the property to Hutchins, to be delivered on the ground at some time after thirty days from April 19th. And there is no evidence in the case to show what the illness was, or that it was such as to prevent a speedy determination of the matter. There had been no change of policy, and plaintiff expected to take the property, until about the 21st of May, when the change took place and the alleged attempt to get possession was made. That was 34 days after the tender and 31 days after the agreement to at once notify, and the notice was not given until May 27th.

Diligence, where the facts are ascertained and undisputed, is a question of law for the court.

Rhett vs. Poe, 2 How. 457.

What is a reasonable time, where the facts are clear, is always a question exclusively for the court.

Earnshaw vs. United States, 146 U. S. 60.

Paine vs. Central Vermont R. R., 118 U. S. 152.

McCandless vs. Lansing, 19 Haw. 474.

Nunez vs. Dautel, 19 Wall. 560.

Citations of cases are of little value on this point. The agreement is to at once notify whether a delivery could be had of property the location of which was specified, and this fact should have been ascertained within a day or two at the most. No case can be found where a notice after forty days is held to be within a reasonable time. In the case of the removal of goods consigned by a common carrier, the cases have been collected by the editors of the Lawyers' Reports Annotated, in noting a case where it was held that one and one-half business days was a reasonable time.

8 L. R. A. (N. S.) 240.

And on contracts of sale six days, in one case, was held an unreasonable time to accept.

Dry Goods Co. vs. Reynolds, 64 Fed. 560.

see also:

The M. M. Hamilton, 17 Fed. Cas. 555.

The words used are "at once." This means immediately; forthwith; as soon as possible; as soon as, under the circumstances, could reasonably be done.

And three weeks is altogether too long a time to complete an investigation as to the purchaser's insolvency, where the agreement was to ship at once.

Oklahoma Vinegar Co. vs. Hamilton, 132 Ala. 593; 32 So. 306.

VI.

THE EXECUTION WAS IMPROPERLY ADMITTED, AND THE RETURN THEREON DOES NOT AFFECT THE DEFENDANTS — CERTAINLY IS NOT CONCLUSIVE AGAINST THEM.

It is not the execution and the return upon it which binds the defendants; it is the judgment. Therefore, they cannot be bound by what took place, although they may be relieved by what took place under the execution. Their obligation was not to return to the sheriff, but to return to the plaintiff. If no writ *de retorno habendo* had been issued, it would still have been the duty of the defendant to redeliver the property.

Douglass vs. Douglass, ubi supra.

Sweeny vs. Lomme, ubi supra.

Stevens vs. Tuite, ubi supra.

Carrico vs. Tayler, 3 Dana 33.

Peck vs. Wilson, 22 Ill. 205.

The only writ to be issued is the writ *de retorno habendo.*

Freeman on Executions, Sec. 468.

The return of "not satisfied" does not show that defendant has no property subject to the execution.

Freeman on Executions, Sec. 356.

Nor can the officer leave it uncertain, from his return, whether the writ has or can be executed.

Freeman on Executions, Sec. 357.

"To be sufficient, the return must show upon its face that the command of the writ has been complied with, or the existence of such a state of facts as, without fault or negligence on the part of the officer, hindered such compliance."

Freeman on Executions, Sec. 355.

Bank vs. Barnes, 29 Tenn. 244.

McCrovy vs. Chaffin, 31 Tenn. 307.

In the case at bar, the sheriff does not pretend to have complied with the writ, and says he did not satisfy it because he was unable to "levy" on the property described in the execution. The property described in the execution was the property which he was directed to take and deliver to the plaintiff; not to levy on at all. He was directed to levy on other property of the defendant, in case he could not take and return the property described in the writ. Of course he could not levy on that property. "Levy" means to seize or take by compulsion. If the property was tendered back and was in the possession of the plaintiff, it could not be seized and taken under the writ, so that the return would not contradict any testimony given by the plaintiff. But, outside of that, the officer must show in his return on a writ *de retorno habendo* that he could not find the property within his jurisdiction.

Am. & Eng. Enc. Law, Vol. 24, p. 536.

There is nothing to show that the sheriff could not find the property in the jurisdiction. It was his duty to take it, otherwise. If it is said that this is a return, that, although he could find it, he was unable to take it for a reason which the law would justify, the answer is that, in the first place, the reason is not stated and he cannot bind us by this general statement, and, in the second place, reasons given by an officer for not serving are not conclusive.

Hessong vs. Pressley, 86 Ind. 555.
Lindley vs. Kelley, 42 Ind. 294.
Parks vs. Alexander, 29 N. C. 412.
Gayso vs. Hickey, 4 La. 361.
Hassell vs. Bank, 39 Tenn. 380.

"It is not a due return if the endorsement be such as is not authorized by law, whether it be true or false. The endorsement on this execution 'no money made' is not authorized by law. If the property could be found, it was the duty of the sheriff to levy on execution and make the money, and so endorse the fact. If he could find nothing whereon to levy, that fact should be endorsed."

Harmon vs. Childress, 11 Tenn. 326.

The rule, however, is that such a return, even in the case of a forthcoming or delivery bond taken by the sheriff on execution, is only *prima facie* proof. The bond in this case has been well said to be somewhat similar to forthcoming and delivery bonds.

Am. & Eng. Enc. of Law, Vol. 13, p. 1132.

And the effect of a sheriff's return has been held by numerous decisions, with only one decision in

Arkansas to the contrary, to be that such a return is only *prima facie* evidence of forfeiture.

Am. & Eng. Enc. of Law, Vol. 13, p. 1149.
17 *Cyc.* 1380.

Williams vs. Crutcher, 5 How. 71 (Miss.); 35 Am. Dec. 422.

Adler vs. Green, 18 W. Va. 201.

In the Washington Ice Co. case, relied on so strongly by the plaintiff, evidence was admitted over objection to contradict the sheriff's return, with the apparent approval of this court.

Moreover, as the court below ruled, the return is only evidence of what took place whilst the execution was in the hands of the officer, and the evidence shows that it was in his hands but a very short time—at most, two days,—and, as we contended, and we think the evidence shows, only long enough to write out a return.

Freeman on Executions, Secs. 9a, 363.

Exceptions 6, 7 and 10, under which the execution and return were admitted, should be sustained. Plaintiff's Instruction No. 13-C (Exception 108) is misleading; if there is anything in the return which is admissible, the return is not conclusive, and therefore the instruction erroneous. Plaintiff's Instruction No. 14 (Exception 110) is erroneous in assuming that, upon the return of the execution, the right accrued to bring the action—an erroneous statement of law and confusing to the jury, and would lead them to infer that the return was conclusive.

VII.

THE WHOLE PROCEDURE OF THE COURT, AS SHOWN IN THE INSTRUCTIONS GIVEN AND REFUSED AND THE RULINGS ON EVIDENCE, WAS ERRONEOUS AS APPLIED TO THE FACTS IN THIS CASE. WHILE DENYING A MOTION FOR AN INSTRUCTED VERDICT, THE JURY WERE, IN EFFECT, INSTRUCTED TO RETURN A VERDICT AGAINST THE DEFENDANTS, AND, ONE BY ONE, EVERY GROUND ON WHICH THE DEFENDANTS STOOD WAS WITHDRAWN FROM THE CONSIDERATION OF THE JURY.

The defense of the defendants in this action was that they were sureties, and, as such, did not stand in the position of the defendants. But (Exception 98) the jury were instructed that Henry Waterhouse "in contemplation of law authorized said Clinton J. Hutchins, Trustee, to represent him in said action of replevin, and said Waterhouse thereby became identified with said Clinton J. Hutchins, Trustee, in interest * * * so as to be concluded by the proceedings and judgment in said replevin suit, and that the record of the proceedings and judgment in said suit are also conclusive and binding upon the defendants in this suit." This ignores an important factor in the relation of obligee and

surety. There are many things which, if done, would be binding on the principal but not on the surety. It is not everything in the action which is so binding, viz., assenting to a material change. The jury, under this instruction, were led to believe that the surety was bound by Hutchins, who represented him, and was bound by all Hutchins' actions in the return of the property.

Again (Exception 100), the jury were instructed that the offer must be accompanied by such action on the part of Hutchins as would enable the plaintiff to obtain actual possession of the property in question; entirely ignoring the plaintiff's demand that Hutchins let the property alone. So (Exception 101) the jury were instructed that the offer must be *bona fide,* which is material so far as the surety is concerned; and (Exception 103) that it was the duty of Hutchins to take such measures as would enable plaintiff to obtain actual possession of the property, and, if he did not, the verdict should be for the plaintiff. Active measures are again referred to (Exception 104) and the jury instructed that unless Hutchins sought and delivered the property the sureties were liable; (Exception 105) further active steps by Hutchins are demanded; (Exception 106) good faith was to be passed on by the jury; (Exception 109) the delivery was to be unconditional, although Hutchins clearly had the right to reserve the condition of prosecuting his appeal; (Exception 110) the right at once accrued to the plaintiff, upon the return of the execution, to main-

tain the action, and nothing else than the payment would constitute a defense; (Exception 111) under certain circumstances, if Scott was prohibited from going upon the land and taking the property off, the verdict must be for the plaintiff; and (Exception 112) if the rails "were lying on lands of third persons, and that neither Hutchins nor Scott made an attempt to secure the delivery of them to the sheriff, your verdict must be for the plaintiff." What this means as applied to the facts, we are unable to determine. The rails in question, or a substantial part of them, were lying on lands of third parties, and neither Hutchins nor Scott made an attempt to secure a delivery of them to the sheriff. They were simply delivered as they had been originally taken, in the same condition, and the plaintiff was willing to take a delivery in that same condition.

These instructions are clearly erroneous as applied to the case which the defendants made out. Their contentions, so far as the satisfaction of the bond is concerned, were:

(a) That the plaintiff took possession of the property through the Kapiolani Estate, Limited, and simply asked that its possession should not be interfered with.

(b) That Hutchins, in answer to this, tendered back the property in the same condition as it had been replevied, making the perfectly proper reservation that he intended to prosecute his appeal.

(c) That the plaintiff accepted this delivery,

without reservation, except that Hutchins was to keep his hands off the property.

(d) That the plaintiff, before demanding the property of Hutchins, had agreed with the Kapiolani Estate, Limited, to sell the property to it at any time within thirty days from the expiration of a previous option, the property to remain on the ground where it was, at the option of the Kapiolani Estate, Limited, viz., thirty days from April 19th, thus necessitating the property remaining where it was for thirty days.

(e) That the plaintiff and Hutchins entered into a further negotiation, in which the plaintiff agreed that Hutchins might buy the property at the end of this thirty days, subject to the previous option; in other words, buy it where it was, on the ground, after thirty days.

(f) That three weeks later the plaintiff complained that one Scott, who had been interested with Hutchins, was interfering with the property—a charge which was disproved.

(g) That a change of policy took place by which the plaintiff did not any longer desire the property, and that the execution was put in the hands of the sheriff, not for the purpose of taking the property, but for the purpose of *not* taking it and of laying the foundation for a suit for the value.

(h) That Scott, at Kona, notified Cooper that the property had been redelivered, but that he and

Hutchins stood ready to do everything they could to assist the plaintiff, if such assistance was necessary.

(i) That, whether the relations of the Kapiolani Estate, Limited, and Hutchins and Scott were hostile or not, the Kapiolani Estate was not standing in the way of the plaintiff's getting the property.

Upon these facts the defendants asked numerous instructions, seeking to differentiate the rights of the surety from the rights of the principal on the bond, and the obligation of the plaintiff to the surety is distinguished from his obligation to the principal and under what circumstances the surety would be released. Of all these instructions, but one was given: Defendants' Instruction No. XI, that the obligee was bound to act in good faith and with reasonable promptness towards the surety, and to accept or reject a valid tender; but this valid tender was to be made as otherwise instructed, and those instructions, given at the request of the plaintiff, we have referred to. It is true the jury had been instructed that a valid tender would discharge the sureties and that it did not have to be kept good; but these instructions have to be read in connection with the instructions requested by the plaintiff.

Upon the character of the obligation which the defendants assumed, every instruction was refused. Thus, defendants' Instructions II, that the undertaking was to be construed strictly, and the sureties were entitled to stand on the letter of their un-

dertaking; III, that the surety was entitled to good faith and confidence between the parties; XII (Exception 85), that the plaintiff cannot disable itself to promptly accept such delivery, and that if by the option to the Kapiolani Estate, Limited, it bound itself not to remove the railroad material in question for thirty days, this would discharge the surety; XIII (Exception 86), the estoppel on the Kapiolani Estate, Limited, which bears on the good faith of the plaintiff; 14 (Exception 87), the waiver of the plaintiff of the duty of Hutchins to seek out the plaintiff — an instruction which the facts amply warranted, and which is good law; 18 (Exception 89), that sureties are favorites in the law and are entitled to the utmost good faith from the creditor, who cannot enlarge, change or injuriously prejudice them, and that if they found from the evidence that the plaintiff first endeavored to sell the property and then adopted a change of policy and endeavored to create a liability on the bond, the sureties were released; 19 (Exception 90), that if it dealt with the property in the option as its own and under its control, it would be a waiver of tender and a release of the surety; 21 (Exception 92), that a refusal to accept tender is a waiver of tender, and that Hutchins would not be called upon to go to Kona and point out each item, but that the sureties would be released by such waiver. Every one was refused, as we contend, erroneously. In the mind of the Court, the giving of any of these instructions would be dangerous to the plaintiff's rights.

As the instructions are applicable to the facts, and are good in law, the only justification for refusing them is that there was nothing to go to the jury. Or, to put it in another way, while the jury were instructed to pass upon the facts, each specific fact was taken from their consideration, and each rule of law applicable to the fact was refused to be given to them. What was left to be submitted was a simple proposition, from which there is no escape on the facts, viz.:

Did Hutchins seek out the plaintiff and tender the property in good faith? Clearly he did not; because the plaintiff sought him out. Moreover, in order to constitute a seeking out and tender in good faith, the jury were instructed that it must be shown that Hutchins did certain acts to put the plaintiff in possession; not only that he tendered the property, but that he did the acts, which could not be shown because the plaintiff was already in possession of the property through the Kapiolani Estate, Limited.

Space forbids reviewing these exceptions in detail. We only recall plaintiff's instructions 15 and 16, which absolutely ignore the issue of tender and prompt action, and instruct the jury that if, at a time thirty days later, when the execution was in the hands of the sheriff, certain things had been done and Scott was prohibited from going upon the land, the verdict must be for the plaintiff; and if a substantial part of the rails were lying on lands of

third persons, and neither Hutchins nor Scott made an attempt, thirty days later, to secure the delivery to the sheriff, the verdict must be for the plaintiff. Sureties cannot be bound by acts of their principals or failure to act thirty days after a valid tender and refusal or acceptance of that tender.

VIII.

THE ADMISSION OF THE TRUST DEED—HUTCHINS TO THE HENRY WATERHOUSE TRUST COMPANY, LIMITED — AND THE RULINGS CONCERNING THE SAME ARE MATERIAL ERROR, PREJUDICIAL TO THE DEFENDANTS, AND DEMAND THAT THE EXCEPTIONS BE SUSTAINED AND A NEW TRIAL GRANTED.

This question arises under (Exception 66), when a certified copy of this deed was admitted in evidence over the objection of the defendants; (Exception 74) when Mr. Shingle, president of the Henry Waterhouse Trust Company, Limited, was on the stand, and, having testified that the deed had terminated some time in January, 1904, long prior to the time in question, was asked whether the Henry Waterhouse Trust Company, Limited, made any claim to this property against the plaintiff, which question was excluded on the ground that it was irrelevant and immaterial and not proper surrebuttal, and was

further asked (Exception 75) "or make any claim to the property after that time (meaning January, 1904) as against C. J. Hutchins, Trustee," which was excluded on the same ground; (Exceptions 102 and 106) two instructions requested by the plaintiff, under the former of which the Court instructed the jury, in reference to this trust deed, "that the recording of that deed in the Registry Office gave notice to the plaintiff that the legal title to the property had been transferred by Hutchins to the Henry Waterhouse Trust Company," and, further, that if they found that an actual tender had been made by Hutchins and refused by the plaintiff, the jury could take into consideration the fact "that said conveyance to the Waterhouse Trust Company was on record, in deciding whether plaintiff was justified in refusing the tender," while under the latter, in instructing whether the offer or tender was made in good faith, the jury were told, "In this connection you should consider whether it has been shown that at the time the offer was made Hutchins had authority to return the property;" (Exception 93) where the Court refused the defendants' request to instruct the jury that, although they might find from the evidence that there were certain claims against the property, if nevertheless they found from the evidence that the plaintiff "was not influenced by said claims, then said claims cannot be urged by plaintiff as a ground for a refusal to accept a tender."

(Exception 124A), from which it appears that a

few minutes before the jury returned their verdict, and after they had been out some hours, they sent for this trust deed and the instrument to which it refers for a description, viz., the deed from Dortch to Hutchins, Trustee, to the admission of which defendants had excepted under Exception 24, and the papers having been delivered to them under the objection of the defendants that they were immaterial and it was improper, and having considered them, they returned a verdict against the defendants. The Court, in other words, admitted this instrument, which only purported to convey by way of mortgage, not the property, but "all the right, title and interest" of C. J. Hutchins, Trustee, in the property, which the evidence showed had been terminated by the performance of its condition before maturity, for two purposes: one, to justify a verdict for the plaintiff, if in their estimation the existence of this trust deed was sufficient ground for the refusal of the tender, a ground which was doubly vicious, for the fact that the deed was on record is not material on the question of tender and refusal, since it did not affect the refusal in fact, since plaintiff was unaware of it; and, again, it left it to the jury to determine what weight should be given to the recorded deed, whereas it is a matter of law for the Court to determine whether the defendants were justified in refusing because of the recorded deed. The other purpose is to show want of power in Hutchins to return. The recorded deed is notice to subsequent purchasers and incumbrancers only (of whom the plain-

tiff was not one) of an outstanding incumbrance (Jones on Mortgages, Sec. 523, 530, 723); but in this case the outstanding incumbrance did not exist, or, if objected on that ground, the outstanding title could have been discharged. To make the matter worse, we were not allowed to show (Exception LXXIV) that the Henry Waterhouse Trust Company, Limited, made no claim against the plaintiff; (Exception LXXV) that it made no claim against the defendants. Upon the other hand, the jury were instructed, under Exception 106, to find whether it had been shown at the time the offer was made that Hutchins had authority to return the property; which left it open to the plaintiff to argue that Hutchins had no such authority, since the deed was on record.

Defendant sought to remedy these errors by the instruction refused and excepted to under (Exception 93), viz.: that in justifying the refusal of a tender one cannot advance a reason which he did not have in his mind. The jury should have been instructed that if the claim did not influence its action, the jury should not consider it. The reason is obvious. If Mr. McClanahan had declined the tender because of the trust deed, the defendants could have had it immediately discharged.

Besides all this, the mortgage was terminated and wholly discharged, and could have no effect on the right of Hutchins to tender or the right of the plaintiff to refuse.

"SEC. 886. *At common law, payment or tender of payment at the time* mentioned in the condition of the mortgage wholly discharges the incumbrance. Payment before the day named in the condition, equally with payment at the day, saves the breach of the condition and defeats the estate. In such case no written release is needed except as evidence of the facts, and to remove the apparent incumbrance from the records."

Jones on Mortgages, Sec. 886.

The giving of the instruction (Exception 106) and the refusal to give the instruction (Exception 93) are equally vicious, on this ground: The plaintiff should not have been allowed to go to the jury on the question of whether Hutchins had authority to return, since he was described in the Dortch deed as trustee. That term is merely *descripto personae.* He had been sued by the plaintiff personally, with the addition of that appellation. He had answered, judgment had been obtained against him, and the property had been replevied from him in that form and redelivered by a redelivery bond given. Under what pretense could the plaintiff, as it did, go to the jury on the question whether Hutchins, being a trustee, had a right to return the property? Outside of this, it appeared at the trial that the only person interested, besides Hutchins, was M. F. Scott, and the uncontradicted evidence is that Scott was doing all he could to return the property.

IX.

THE COURT ERRED IN ASSUMING THAT THE JUDGMENT IN THE CIRCUIT COURT, IN FAVOR OF BIERCE AND AGAINST HUTCHINS, TERMINATED HUTCHINS' TITLE IN THE PROPERTY AND GAVE IT TO THE BIERCE COMPANY.

"The contract says in terms that it is conditional, and that the goods are to remain the property of the seller until payment of the note given for the price. This stipulation is perfectly lawful."

Bierce vs. Hutchins, 205 U. S. 340.

"Such sales sometimes are regulated by statute and put more or less on the footing of mortgages."

Bierce vs. Hutchins, ubi supra.

"It is an executed contract, one by which the ownership passed to the appellee, with a reservation of title simply as security for the purchase money—in other words, an equitable mortgage."

Beardsley vs. Beardsley, 138 U. S. 262.

"A sale, with retention of the legal title, is security for purchase money."

Beardsley vs. Beardsley, ubi supra.

The original action was not brought to secure a forfeiture, but to obtain possession of the property, on the ground that payments had not been made.

Exhibit "A" attached to the complaint showed that bills of sale of the property were delivered, and the right to re-take is based on the failure to pay and the fact that Hutchins retained possession, contrary to the right of the plaintiff. But nowhere were there any facts alleged or any prayer to foreclose the equitable title of the defendant, which had passed to him by the sale from Dortch. The judgment then simply determined the right to the possession, on the ground that the title had been retained as security and had no effect to foreclose or forfeit any rights of the defendants.

Forfeitures are not favored in Hawaii.

Hong Kim vs. Hapai, 13 Haw. 328.

In fact, it would appear that the law here is that if a rescission is to be made of the contract, the parties must be restored to their original position and the consideration money which had been received by Bierce should be restored.

Delemar vs. Hobron, 3 Haw. 748.

The defendant had an equitable title, which he was entitled to make a legal one at any time before it was foreclosed by the payment of the debt, and which the plaintiff could only foreclose by having the property sold and paying the surplus, if any, to the equitable owner.

Puffer vs. Lucas, 112 N. C. 377; 17 S. E. 174; 19 L. R. A. 682.

Tufts vs. D'Arcambal, 85 Mich. 185; 24 Amer. St. Rep. 79.

The plaintiff must either rescind the contract and return the consideration, or else it is still liable, upon payment of the amount due, to deliver the goods upon payment under the original contract.

Miller vs. Steen, 30 Cal. 403; 89 Am. Dec. 124.

And it is well settled that a conditional sale vests an interest in the buyer that he can sell or mortgage.

Beach's Appeal, 58 Conn. 473.

We raised the question promptly under (Exceptions XVII, XVIII, and XIX), which in themselves are not so important, save that they show the attitude of the court. Mr. Robertson called for the production of these deeds. We promptly objected to their production, and the court declined to rule, holding, in effect, that it was powerless; in other words, that counsel could put a witness on the stand, call for testimony which was irrelevant and immaterial, and counsel on the other side could not object to its production, but had to wait until the counsel calling for it could examine the evidence and see whether it was material or relevant. It would appear that we had the right to object to a line of testimony and to the production of this testimony without being exposed to the lectures given by the court. We were entirely denied any ruling.

The court again erred, under (Exception XXIII), in admitting the deed from Hutchins to McStocker, and under (Exception XXIV) the Dortch deed. The former deed purports to convey certain lands and

leases and a sugar mill, and all other personal property conveyed by Dortch not heretofore assigned to C. J. Falk or J. R. Sloan. It nowhere mentions railroad or railroad equipment. The latter conveyed all the right, title and interest of the Kona Sugar Company, Limited, in the railroad and railroad equipment, whatever that right, title and interest is, and is introduced, we assume, to identify the property conveyed in the McStocker deed. But (1) it is not shown what property was conveyed to Falk and Sloan, (2) all reference to railroad stock and equipment is sedulously left out of this deed, although contained in the Dortch deed, and (3) the Dortch deed does not purport to convey the property itself, but a right, title and interest, if any; and the poor jury, confused already by the introduction of deeds which had no relation to the question of whether a tender or delivery of the property had been made in good faith, were instructed (Exception 115) that the legal construction of the deed to McStocker was to convey all there was conveyed to Hutchins by the Dortch deed, excepting what he had conveyed to Falk and Sloan—a confusing and misleading instruction, and intended to lead the jury to believe that Hutchins was then conveying the property to McStocker, and that the doing of that act showed that no tender or delivery of the property had been made one and a half years before, and this at a time when the Supreme Court of this Territory had ordered judgment for the defendants and there was no pending appeal to Washington.

We submit that the after-transactions of Hutchins are immaterial as bearing on the question of delivery or tender; that, in fact, there is no evidence that he did convey his interest, that he had a right to convey his interest, and that the conveyance would have no weight in determining whether, in good faith, he had tendered the property a year and a half before, because that tender was made subject to the right to litigate his own title; and, lastly, at the time when the deed was made, a judgment had been rendered apparently conclusive in its favor.

The same point arises under another line of exceptions. For instance (Exception 114), in which the jury were charged that "the Court having decided in the replevin case that the property belonged to the plaintiff, the plaintiff had the right to sell it or give an option on it whether plaintiff had actual possession of it at the time or not;" and that the option in question could therefore have been given without prejudicing in any way the plaintiff's claim that Hutchins had not made a redelivery of the property. The court did not decide that the property belonged to the plaintiff. It decided that it had the title and right to the possession, but it did not decide that the property belonged to it or that it had the right to sell it or give an option on it, but, if it had, the property being still in the hands of the law and covered by the replevin bond and the redelivery bond, no judgment except a final judgment would give any right to sell or give an option. What-

ever right there is must flow from the contract rights of the parties, and not from the judgment.

The court is in error in assuming that the judgment had changed the rights of the parties. The instruction is still more vicious on the further ground that the option could be given without prejudicing in any way the plaintiff's claim that Hutchins had made a redelivery of the property, which shut out the option from the consideration of the jury.

Our contention was and is that under all the evidence in the case, including this option, it is clear that a tender in good faith was made and accepted and that the plaintiff, for the period of about thirty days, and until it changed its policy, understood that the property was in its possession through the Kapiolani Estate, Limited, to whom it had given this option; and, further, that the giving of the option, and the consequent failure to take a position either one way or the other on the tender, either to decline or accept it, was such an extension of time that it discharged the sureties, and yet the jury were charged that it could be given without prejudicing in any way the plaintiff's claim because of the giving of the judgment in the replevin action. We call attention to the fact that this instruction takes away from the jury the power of considering this option, in connection with the other evidence, to sustain our point, which is, that when the tender of the property was made by Hutchins it was the duty of the plaintiff to the sureties either to accept or reject, and that if prior to this time or at this time it had given

an option to the Kapiolani Estate, Limited, by which it was to leave the property exactly where it was and make no effort to secure it for thirty days, and if its notice to the defendant not to interfere with the property was in the interest of this option, then if, at the end of thirty days, there was any difficulty in getting the property, that could not be charged to the sureties, who were released by its failure to act upon the tender, and that it was not enough for it to say that it accepted the tender if it could get the property after thirty days.

X.

THE COURT ERRED IN REFUSING THE INSTRUCTIONS REQUESTED BY THE DEFENDANTS UNDER EXCEPTIONS 85, 86, AND 87.

In reference to the effect of a contract with the Kapiolani Estate, Limited, not to remove the material for thirty days, as a discharge of the sureties, as an estoppel on the Kapiolani Estate, Limited, to claim against the plaintiff, and as a waiver of tender, we respectfully submit that all three of these instructions should have been given. The jury could properly have found that the contract with the Kapiolani Estate, Limited, as a matter of fact, from all the circumstances, if not as a matter of law, from the written instrument employed, was that the Kapiolani Estate, Limited, should have the right to have the railroad material remain where it was for

thirty days. They were not taking this option in order to remove the material. They wished to use it where it was, and if the plaintiff entered into a contract to leave it where it was for thirty days, then this would have the effect to discharge the sureties, under the admitted law in this case and the instructions of the court.

The instruction asked (Exception 86) is elementary law. The Kapiolani Estate, Limited, having taken this option, was estopped to claim against the plaintiff, and the jury could rightfully consider it as a matter of bad faith on the part of the plaintiff to say that the reason it could not get the property was because the Kapiolani Estate, Limited, claimed it, with whom it was dealing and which admitted its title.

Under the circumstances in this case, it is clear that the instruction asked (Exception 87) should have been given. The jury might well have inferred, from the giving of the plaintiff's instructions (Exceptions 102, 103, 104 and 109) upon this point, that the defendants were liable because Hutchins did not get there first with his tender or offer to return. We had a right to go to the jury on the proposition that, in response to a request from the plaintiff, we had returned or offered to return the property.

XI.

THE EXCLUSION OF THE TESTIMONY OF THE WITNESS COLBURN WAS MATERIAL ERROR.

The defendants, to meet the case of the plaintiff, had introduced evidence tending to show a return of the property or an offer to return in good faith. The plaintiff, to meet this, introduced evidence tending to show that it could not get the property, because of the objections of the Kapiolani Estate, Limited.

The defendants called John F. Colburn, the treasurer and manager, who was admitted to be "the whole cheese" of the Kapiolani Estate, Limited, and, in order to lay the foundation to prove a release of this railroad property to the plaintiff by the Kapiolani Estate, Limited, prior to the offer to redeliver the property, offered to show that the original of a document, a carbon copy of which it produced, and which original it had requested the plaintiff previously to produce, was executed by the president and treasurer of the Kapiolani Estate, Limited, and delivered to the attorney-in-fact of the plaintiff; that the witness had not seen the document since the time of its delivery, and it was then in the hands of the attorneys of the plaintiff. The evidence was rejected, and we were unable to show the release by proving that a certain paper which

the witness produced was a carbon copy of an executed release.

Under Section 1945, Revised Laws of Hawaii, upon proof of the facts which we offered to prove, we could have put the release in evidence; but the court refused us the opportunity to prove that the unexecuted carbon copy was a *fac simile* impression of an executed and delivered document, and, under (Exception 73), broadly refused to allow us to prove a surrender or release at any time between the 14th day of April and 23rd day of May, 1904.

We did not understand at the time on what ground this evidence was shut out, and it is so clearly admissable and so important in the cause that we think we can fairly leave it at this point to the plaintiff to explain how these rulings can be justified. As the testimony was surrebuttal of that of the witness, Cooper, who had just been on the stand in rebuttal, it certainly could not be excluded on the ground that it was not proper surrebuttal. We had endeavored, in cross-examining Cooper, to establish the execution of this release, and failed. It therefore left the case without the release proved. This was our first opportunity to prove the release, and we called the attention of the court to the fact that we were endeavoring to rebut the testimony of Judge Cooper in reference to his difficulty in getting possession of the property from the Kapiolani Estate, Limited.

An examination of the instrument shows that it is a surrender of all claim on the part of the Kapio-

lani Estate, Limited, and a consent to the right of removal of the property from its premises. Such a surrender, if not conclusive evidence that the plaintiff had resumed possession, was evidence to go to the jury upon that fact, in view of Mr. McClanahan's letter that he accepted the return if he could get the property. *This release showed that he could get the property.*

Respectfully submitted,

WILLIAM R. CASTLE,
DAVID L. WITHINGTON,
W. A. GREENWELL,
ALFRED L. CASTLE,

For Defendants in Error.

APPENDIX.

THE REVISED LAWS OF HAWAII, 1905.

SEC. 1851. CREDITORS' CLAIMS, ADVERTISEMENT, BARRED WHEN. Immediately after the appointment of any executor or administrator of any estate, he shall advertise in such newspaper or newspapers as the court shall direct, for as long a time as the court may order, at least once a week for four weeks, a notice to all creditors of the deceased to present their claims, duly authenticated and with proper vouchers, if any exist, even if the claim is secured by mortgage upon real estate, to him, either at his residence or place of business, within six months from the day of such publication. And if such claims be not presented within six months from the first publication of the notice, or within six months from the day they fall due they shall be forever barred, and the executor or administrator shall not be authorized to pay them.

SEC. 1853. SUITS ON REJECTED CLAIMS, COMMENCED WHEN. If any claim be rejected by the executor or administrator he shall give written notice of such rejection to the creditor, and suit must be brought upon it against the executor or administrator within two months after such notice is given, or within two months after the same becomes due, or it will be forever barred.

SEC. 1854. OTHER SUITS, COMMENCED WHEN. Executors and administrators shall in no case be liable to suit until the expiration of six calendar months after probate, or the granting of letters of administration, except in cases of rejected claims as provided in section 1853.

SEC. 2102. AFFIDAVIT BY PLAINTIFF. Where a delivery is claimed, an affidavit shall be made by the plaintiff, or by some one in his behalf, showing:

1. That the plaintiff is the owner of the property claimed, (particularly describing it) or is lawfully entitled to the possession thereof.

2. That the property is unlawfully detained by the defendant.

3. That the same has not been taken for a tax, assessment or fine pursuant to a statute, or seized under an execution or an attachment against the property of the plaintiff, or if so seized, that it is by the statute, exempt from such seizure.

4. The actual value of the property.

SEC. 2103. NOTICE TO SEIZE. The plaintiff or his attorney may thereupon, by an indorsement in writing upon the affidavit, or by other written request thereto attached, require the high sheriff, or his deputy, or the sheriff of the island where the suit is brought, or his deputy, to take the property from the defendant; PROVIDED that no property shall be taken by virtue of this chapter beyond the jurisdiction of the court from which such process issues.

SEC. 2104. BOND BY PLAINTIFF; SEIZURE; SERVICE OF CERTAIN PAPERS. Upon receipt of the affidavit and notice, with a written undertaking executed by two or more sufficient sureties approved by the high sheriff or by his deputy, or by such said sheriff, or by his deputy, to the effect that they are bound to the defendant in double the value of the property, as stated in the affidavit, for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff, the

high sheriff or his deputy, sheriff or his deputy, shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice and undertaking, by delivering the same to him personally, if he can be found; or to his agent from whose possession the property is taken; or if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion; or if neither have any known place of abode, by putting them in the nearest postoffice, post paid, and addressed to the defendant.

SEC. 2106. OBJECTIONS TO SURETIES. The defendant may, within two days after the service upon him, or his agent, as above provided, of a copy of the affidavit and undertaking, or, if he be served with such copy upon an island other than that upon which such action is commenced, within ten days after such service, give notice in writing to the high sheriff, his deputy, sheriff or his deputy, at the seat of the court issuing the process therein, that he objects to the sufficiency of the sureties. If he fails to give such notice within the time specified, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties or others in their place shall justify, as hereinafter provided; but where other sureties are substituted for the original, there shall be a new undertaking.

SEC. 2109. DELIVERY OF PROPERTY TO PLAINTIFF. Where the objection to the sureties is waived, as provided in section 2106, or if, after such objection having been made, the sureties or their substitutes shall justify as provided in section 2108, the high sheriff or other officer having charge of the property taken from the defendant shall immediately deliver the same to the plaintiff.

SEC. 2111. PROPERTY CLAIMED BY THIRD PARTIES. If the property taken be claimed by any other person than the defendant or his agent, and such person shall make affidavit of his title thereto, or of his right to the possession thereof, stating the grounds of such title or right, and serve the same on the high sheriff, his deputy, sheriff or his deputy, such officer shall not be bound to keep the property or deliver it to the plaintiff, unless the plaintiff, on demand upon him or his agent, shall indemnify such officer against such claim by a sufficient undertaking executed by two sufficient sureties, accompanied by their affidavit, (if such officer require,) that they are each worth double the value of the property as set forth in the affidavit of the plaintiff, over and above mortgage debts and other liens upon their property, and that they are householders or freeholders resident within the Territory.

SEC. 2112. BOND FOR DELIVERY TO DEFENDANT. At any time before the delivery of the property to the plaintiff the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof upon giving to the officer a written undertaking executed by two or more sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within five days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, except where the property is claimed by a third party, as is provided in section 2111.

An Act To amend sections fifty-six, eighty, and eighty-six of "An Act to provide a government

for the Territory of Hawaii," approved April thirtieth, nineteen hundred.

(Act of March 3, 1905, ch. 1465, 33 Stat. L. 1035.)

SEC. 3. (*Review by Supreme Court of the United States.*) That section eighty-six of the aforesaid Act be amended by adding the following at the end of said section: "*Provided,* That writs of error and appeals may also be taken from the supreme court of the Territory of Hawaii to the Supreme Court of the United States in all cases where the amount involved, exclusive of costs, exceeds the sum or value of five thousand dollars." (33 *Stat. L.* 1035.)

SEC. 4. (*In effect.*) That this Act shall take effect and be in force from and after its passage. (33 Stat. L. 1035.)

SECTION 17. Section 71 of said Chapter LVII (Civil Laws, Sec. 1435) is hereby amended so as to read as follows:

"Section 71. An appeal duly taken and perfected in any case from a judgment, order or decree of a Circuit Judge or District Magistrate shall operate as an arrest of judgment and stay of execution; Provided, however, that the Judge or Magistrate may, upon good cause shown, allow execution to issue or other appropriate action to be taken for the enforcement of such judgment, order or decree, pending such appeal, unless the applicant shall within such time as shall be allowed by the Judge or Magistrate deposit a bond in such amount and with such sureties as shall be approved by the Judge or Magistrate (the amount to be not less than double the amount of the judgment, order or decree, if it is money judgment, order or decree) conditioned for the prosecution of the appeal without delay and for

the payment or other performance, as the case may be, of the judgment, order or decree or part thereof that may be rendered or affirmed in the appellate court; and, provided further, that no political corporation or officer or executor, administrator, guardian, trustee, or receiver, acting in his official capacity, need deposit such bond in order to prevent the enforcement of such judgment, order or decree, pending the appeal, and provided further, that in case of an appealable order of a Circuit Judge for counsel fee, suit money, temporary alimony, or other provisional order of a like nature made before final judgment in the cause, an appeal shall not operate as an arrest of judgment or stay of execution, if the appellee shall deposit a bond in such sum and with such sureties as the judge shall approve, conditioned for indemnification of the appellant for all damages that he may sustain by reason of the payment or execution of such order, in case the appeal shall be sustained."

SECTION 19. Section 75 of said Chapter LVII (Civil Laws, Sec. 1239) is hereby amended so as to read as follows:

"Section 75. Upon the allowance of such bill of exceptions and the deposit of twenty-five dollars, or a bond of the same amount, by the party excepting with the clerk of such Court, for costs to accrue in the Supreme Court, the questions arising thereon shall be considered by the Supreme Court; but judgment may be entered and may be enforced or arrested pending such exceptions as provided in Section 71 in the case of an appeal, *mutatis mutandis*."

SECTION 22. This Act shall take effect on the first day of August, 1903.

C. L., Sec. 1239. Upon the allowance of such exceptions and the deposit of twenty-five dollars, or a

bond of this amount, by the party excepting, with the Clerk of such Court, for costs to accrue in the Supreme Court, the questions arising thereon shall be considered by the Supreme Court. If, however, the exceptions shall appear to the Judge before whom the trial is had to be frivolous, immaterial or intended for delay, judgment may be entered in the cause, and execution may be awarded or stayed on such terms as the Judge shall deem reasonable, notwithstanding the allowance of exceptions. 5